United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

77-7055

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

---x

RANDOLPH PHILLIPS,

Plaintiff-Appellant,

-v-

ALLEGHANY CORPORATION,

Defendant-Appellee.

INVESTORS DIVERSIFIED SERVICES, INC.,

Defendant.-Appellee.

---x

C/A DOCKET NO. 77-7055

72 Civil 1544

On appeal from Judgment
and Orders Dismissing
Amended Complaint and
Vacating Default Judgment

Frankel, Brieant and
Tenney, District Judges.

FILED
MAR 31 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

JOINT APPENDIX

RICHARD L. BOND, ESQ.
Marshall, Bratter, Greene,
Allison & Tucker
430 Park Avenue
New York, N. Y. 10022
Attorneys for Defendant-
212-421-7200

RANDOLPH PHILLIPS
Plaintiff-Appellant Pro Se
30 East 72nd Street
New York, N. Y. 10021
212-734-6776

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

	Pages
Docket entries	1a-6a
Complaint & Summons	7a , 12a
Order ex parte dated May 10, 1972	13a
Judgment #72,542 and supporting papers	17a
Order to show cause dated May 15, 1972	21a
Reply affidavit of Richard L. Bond May 25, 1972	35a
Affidavit of Randolph Phillips May 25, 1972	46a
Notice of Appeal filed June 8, 1972	51a
Memorandum Opinion by Frankel, D. J., #38571	52a
Opinion denying reargument #38629	59a
Affidavit of Randolph Phillips, affirmed June 12, 1972	61a
Notice of motion dated June 8, 1972 to dismiss for lack of jurisdiction by IDS	73a
Notice of motion dated June 27, 1972, to dismiss for lack of jurisdiction by Alleghany	78a
Notice of motion by Alleghany dated July 7, 1972 dismissing its own appeal (filed 6/8/72) on the default judgment	89a
Decision and order by Judge Charles Brieant dated July 20, 1972, granting Alleghany's motion to dismiss its own notice of appeal	95a

Notice of appeal by Phillips of Judge Charles Brieant's order dated July 20, 1972; 96a

Endorsement & Order, Brieant, D. J. filed Sept. 25, 1972 97a

Motion of Randolph Phillips for reargument dated October 4, 1972 99a-109a

Notice of motion by defendants dated June 12, 1974 for an order compelling plaintiff to replead 112a

Endorsement denying reargument filed Dec. 11, 1972 110a

Affidavit of Randolph Phillips affirmed to June 27, 1974 and Notice of Motion dated July 8, 1974 126a

Memorandum by Tenney, D. J. #41128 128a

Affidavit by Michael Graham, 138a

Amended Complaint filed November 18, 1974 143a

Answer filed December 23, 1974 152a

Notice of Motion under Rule 11, FRCP. 1/17/75 165a

Phillips' amended notice of appeal from the order dated August 28, 1974 of Judge Tenney filed September 26, 1974; 184a

Stipulation filed December 10, 1974 185a

IDS' notice of motion for summary judgment dated December 20, 1974, supporting affidavit of Richard L. Bond, Esq. sworn to on December 20, 1974, and exhibits C, D, E and F thereto; 187a

IDS' Rule 9(g) statement dated December 20, 1974; 211a

Affidavit of Richard L. Bond, Esq. in reply to Phillips' opposition to its motion to dismiss and/or for summary judgment sworn to on January 27, 1975, and exhibits G, H, I and J thereto; 212a

Affidavit of Richard L. Bond, Esq. in opposition to Phillips' Rule 11 motion sworn to on January 24, 197$\overset{5}{4}$; 230a

IDS' order to show cause, dated and signed by Judge Charles H. Tenney February 4, 1975, affidavit of Richard L. Bond, Esq. 238a

Transcript of oral argument dated February 7, 1975; 249a

Affidavit of Richard L. Bond, Esq. sworn to on February 13, 1975, exhibit A thereto; affidavit of Carl E. Newton sworn to on February 11, 1975; 251a

Transcript of oral argument February 14, 1975 267a

Affidavit of Richard L. Bond, Esq. in opposition to Phillips' motion to stay proceedings pending determination of his motion to disqualify Richard L. Bond, Esq. sworn to on February 24, 1975; 295a

IDS' opposition to plaintiff's Rule 9(g) statement dated January 27, 1975; 300a

Notice of application for a stay, dated 2/18/75 302a

Plaintiff's Statement under Rule 9(g) 318a

Plaintiff's opposition affidavit 321a

Supplemental affidavit of Randolph Phillips, 1/22/75 324a

Notice of motion under Rule 5(b)(4); 2/4/75 345a

Affidavit (Reply) of Randolph Phillips, 2/10/75 350a

Order, signed by Judge Charles H. Tenney re Court of Appeals judgment and restoring the case to his docket filed June 30, 1975; 352a

Notice of entry, dated Feb. 20, 1975, and appended Order dated 2/18/75 by Tenney, D. J. 354a

Memorandum by Tenney, D. J., dated 12-16-76 359a

Judgment dismissing Phillips action against IDS filed December 20, 1976; 379a

CIVIL DOCKET

STATES DISTRICT COURT

Tenney

Jury demand date:

JUDGE TENNEY

72 CIV. 1544

[illegible] No. 106 Rev.

TITLE OF CASE	ATTORNEYS
RANDOLPH PHILLIPS AGAINST, VESTORS DIVERSIFIED SERVICES, INC. AND GHANY CORPORATION. Judgt 5/1[illegible]) [illegible]	For plaintiff: RANDOLPH PHILLIPS 30 EAST 72nd St. N.Y.C. N.Y. 10021 For defendant: Marshall Bratter Greene Allison &Tuck 430 Park Ave., N.Y. 10022

BEST COPY AVAILABLE

STATISTICAL RECORD

J.S. 5 mailed X

J.S. 6 mailed [illegible]

Basis of Action [illegible]

Action [illegible]

COSTS

Clerk

Marshal

Docket

Witness

Deposition

DATE	NAME OR RECEIPT NO.	REC.	DISB.
4/?/72	R. Phillips	15 —	
4/18/72	[illegible]		15 —
6/8/72	Marshall, B	5 —	
6/19/72	M S [illegible]		5 —
[illegible]	R Phillips	5 —	
[illegible]	M S [illegible]		5 —
[illegible]	R Phillips	5 —	
[illegible]	[illegible]		5 —
[illegible]	Phillips	5	
[illegible]	[illegible]		5 —
5/7/75	Phillips	5 —	
5/14/75	[illegible]		5 —

A

VS. INVESTORS DIVERSIFIED SERVICES, INC. ET-ANO

JUDGE FRANKEL
72 CIV. 15

TE	PROCEEDINGS	Date Judge
[illegible]	[illegible]	
May 11-72	Filed summons with marshal's ret. Served Jared Horton, V.P. by Clifford H. Ramsdell, V.P. Corporate Relations on 4/20/72.	
May 11-72.	Filed Order extending deft. Alleghany Corp.'s time to answer complaint to 6/2/72; ordered that service of a copy of this order, and all papers on which it is granted, on Mr. Randolph Phillips, plaintiff, be deemed sufficient. Lasker, J. (mailed notice).	
May 12.72	Filed Judgment # 72,542. Ordered that pltff. have judgment against dft. Alleghany Corp., in amt. of $94,950. together with 6% interest from 10/13/64 amting. $42,727, & together with costs & disbursements amting. to $19.32, amting. in all to the sum of $137,696.82. Clerk. Ent. 5/15/72. (mailed notice)	
May 16.72	Filed Order to Show Cause. Re: Set Aside Default. Ret. 5/18/72. Ordered that pending the hearing & determination ~~xkx~~ of this motion the Clerk of this court is directed to issue no execution upon the aforesaid Judgment by Default Judgment 72,542; Further Ordered pending the hearing & determination of this motion, pltff. is enjoined & restrained as indicated; Further Ordered etc. Frankel J.	
MAY 18-72	Filed Notice of Deposition.	
MAY 31-72	Filed request for production, and inspection ~~inspection~~ and reproduction of documents.	
Jun 8, 72	Filed Notice of Appeal. (mailed notice)	
Jun 12.72	Filed Pltff's Memorandum of Law in opposition to dft. Alleghany Corp's Motion, etc.	
Jun 12.72	Filed Affidavit of pltff. Randolph Phillips in answer to affidavit of Richard L. Bond, Esq., Sworn to 5/10/72, etc., and in support of pltff's request that this court dissolve & vacate forthwith its orders hereindated 5/10/72 & 5/15/72.	
Jun 9.72	Filed Dft. Investors Diversified Services, Inc. Notice of Motion. Re: Dismiss Complaint Ret. 6/20/72.	MBC
Jun 9.72	Filed Memorandum of Law in support ofmotion by dft. Investors Diversified Services, Inc. to dismiss complaint for lack of subject matter ~~ax~~ jurisdiction.	
Jun 15.72	Filed Opinion # 38571. Motion to vacate the default is granted Movant's time to answer to complatint or make appropriate motions is extended to 6/27/72. In accordance, at oral agument service of papers, etc. as indicated. Frankel J. (mailed notice)	
Jun 19.72	Filed Notice of Motion Re: Reargument. Ret. 6/27/72. (pltff)	
Jun 28.72	Filed Dft. Alleghany Corp. Notice of Motion. Re: Dismiss Ret. 7/18/72 in room 110 at 10:00.a.m.	
Jun 28.72	Filed Memorandum in support of motion by Alleghany Corp., to dismiss for lack of subject matter jurisdiction & for alternative relief.	
Jun 26-72	Filed Memorandum on behalf of deft. Alleghany Corp. in opposition to pltf's. motion for reargument.	
Jul 3-72	Filed OPINION #38629. Frankel, J. The motion for reargument is denied. It is so ordered. Frankel, J. (mailed notice).	
Jul 3-72	Filed Affidavit of Richard L. Bond in support of award to Alleghany.	
Jul 3-72	Filed Memorandum on behalf of deft. Alleghany Corp. in support of imposition of costs and attorneys' fees against plaintiff.	
Jul 11-72	Filed Notice of Motion re: Dismiss Appeal Ret. 7/18/72. (by Alleghany Corp.)	
Jul 11-72	Filed Memorandum on behalf of Alleghany Corp. in support of motion to dismiss its appeal.	
Jul 18-72	Filed Notice of Appeal (mailed copies).	F

continued next page

[illegible]

JUDGE TENNEY

Page

[illegible] v. INVESTORS DIVERSIFIED SERVICES, INC.
and ALLEGHANY CORPORATION

72 Civ. 1544

Civil Docket Continuation

Pg 2

.E	PROCEEDINGS	Date of Judgment
Jul 21-72	Filed MEM. END. on motion papers filed 7/11/72. As the judgment appealed from has been vacated on 6/15/72 by Judge Frankel of this court, the appeal is moot. The appeal has not been docketed in the Court of Appeals. It is hereby dismissed pur. to FRCP 42(a). Motion granted. So ordered. Brieant, J.	
Aug.10-72	Filed Notice of appeal by Randolph Phillips. (mailed notice).	
Sep 18-72	Filed Additional Summons and Marshal's return served on Investors Diversified Services, Inc. by Veronica McCrory on 5-19-72	
Sep 25-72	Filed deft's affdvt Re: correct error on date.	
Sep 25-72	Filed ENDORSEMENT and ORDER on notice of motion dtd 6-28-72 Re: dismissal., "Motion to dismiss as to deft Alleghany Corp is granted..."(mailed notice pro-se) BRIEANT,J.	
Dec11-72	Filed pltff's motion forreargument, of the motion by deft Alleghany Corp resulting in the order of 9-25-72.	
Dec11-72	Filed deft's memorandum of law in opposition to pltff's motion to reargue.	
Dec11-72	Filed ENDORSEMENT.- On reargument, for the reasons therein, and hereinbefore stated, the prior determination of the Court is adhered to. (mailed notice pro-se) Brieant,J.	
[illegible] 23 -74	Filed true copy of USCA, 2nd Circuit dismissing appeal pursuant to Rule Sec. 0.18(7) of rules of court supplementing FRCP.Clk.	
Jun 14-74	Filed DEFTS ORDER TO SHOW CAUSE, why an order should not be entered providing deft IDS be permitted to submit a recasted ,revised&amplified motion ,etc. vacating notice of deposition served on behalf of pltff Randolph Phillips to depose deft.Investors Diversified Services,Inc.(IDS) on 6/17/74 or in the alternative staying deposition until 10 days after service of entry of order deciding recast motion,etc.as indicated,ret.6/27/74,TENNEY,J.	
Jun 24-74	Filed Defts Affdvt&Notice of Motion for an order directing pltff to replead,etc. ret.6/27/74.	
Jun 24-74	Filed Defts Memorandum in support of motion to compel pltff to re " to stay discovery by pltff and for other relief.	
Jun.28-74	Filed pltff's memorandum in opposition to "memorandum & motion to, compel pltff. to replead ret.6-27-74.	
Jul.5/74	Filed defts. "IDS" to compel pltff. to replead and for a protective order staying discovery by pltff.,etc.	
Jul.5/74	Filed pltff.'s notice of motion re: order vacating orders of June 15 and Sept. 25,1972,etc.	
Jul.5/74	Filed pltff.'s memo. of law in support of motion to vacate orders,etc.	
Jul 19-74	Filed Affdvt of H.H.Graham for Defts in opposition to motion.	
Jul 19-74	Filed Defts'Memorandum of law in oppositio n to pltff's notice of cross-motion	
Jul 22-74	Filed Pltff's Reply Memorandum to "Defts'Memorandum of Law in opposition to Pltff's "Notice of Cross-motion under Rules 60(b)(4)and 54(b)FRCP.	
[illegible] 26-74	Filed MEMORANDUM OPINION #41128.Accordingly(1)IDS'motion insofar as it seeks an order directing pltff to amend his complaint is denied; (2) IDS'motion as it seeks an order staying pltff from initiating or conducting pre-trial discovery including deposition of Mr. Kirby now pending is granted,stay in effect until 10 days after determination of any IDS motion to dismiss for lack of subject jurisdiction;(3)pltff's cross-motion is denied;(4)IDS is dir- within 20 days of entry of order(Aug.28-74)(a)to move to amend its motion to dismiss,now pending(b)to renew its motion to dismiss.now pending or (c)to move for summary judgment(5)Alleghany or IDS on behalf of Alleghany is directed to renew motion for costs and atty's fees incurred by Alleghany in vacating default judgment erroneously entered against it.So Ordered.Tenney,J.(mn)	

DOLPH PHILLIPS VS. INVESTORS DIVERSIFIED SERVICES,INC.ET ANO

JUDGE TENNEY

Pg.3

	PROCEEDINGS	Date Ord Judgment
Sep 4-74	Filed Notice of Appeal (Pltff Pro-Se) from order dated 8/28/74, filed 8/30/74 denying motion pursuant to Rule 60(b)(d)FRCP for an order vacating as "null and void" for lack of jurisdiction the orders of District Court dated and filed 6/15/72 and 9/25/72 including the orders denying vacatur thereof on reargument(mailed notice to Marshall,Bratter Green,Tucker &Allison on 9/4/74)	
Sep.6-74	Filed Notice that record on appeal has been certified and transmitted to USCA, 2nd Circuit.	
Sep 13 74	**Filed letter to J. Tenney from Richard Bond. dtd 8-8-72 Filed on Sept 3 1974.**	
Sep.1[illegible]	Filed Defts Affdvt&Notice of Motion for an order for leave to amend its pending motion addressed to sufficiency of complaint by adding the grounds that complaint fails to state a claim against deft.Investor Diversified Services, Inc.upon which relief can be granted.	
Sep.19-74	Filed Defts Memorandum in support of Motion by investors Diversified Services, Inc. to amend its pending motion to dismiss complaint.	
Sep.16-74	Filed Pltff(Pro Se) Amended Notice of Appeal to USCA,2nd Circuit from Order dated 8/28/74 and entered on 8/30 denying pltff's motion pursuant to Rule 60(b)(d)FRCP for an order vacating as "null and void" for lack of jurisdiction the orders herein of District Court dated&filed 6/15/72and 9/25/72 including orders denying vacatur on reargument and directing further prosecution of action.(mailed notice to Marshall,Bratter,Green,Tucker&Allison on 9/26/74)	
Oct.15-74	Filed true copy of USCA ,2nd Circuit that motion dated 9/16/74 to dismiss appeal from USDC for SDNY for lack of jurisdiction .Clk.	
Oct.15-74	Filed Petition for writ of mandamus being filed.Petition is denied.Further ordered.that Clerk shall serve copy of this Order on Judge named respondent and all other parties in trial(a true copy of USCA,2nd Circuit)([illegible])	
Oct.21-74	Filed Pltff Pro Se Affdvt&Notice of Motion for Summary Judgment under Rule 56 FRCP against deft,Investors Diversified Services,Inc. in amt of $95,950.etc. Ret.10/29/74	
Oct.21-74	Filed Pltff's Memorandum in opposition to motion of Deft.Investors Diversified Services,Inc. to amend its pending motion to dismiss complaint.	
Oct.21-74	Filed Pltff's Memroandum in support of motion for summary judgment pursuant to Rule 56 of FRCP	
Nov.8-74	Filed Defts Affdvt in opposition to pltff's motion for summary judgment against deft IDS and in support of dismissal of complaint entry of judgment in favor of IDS.	
Nov.8-74	Filed Memorandum of Investors Diversified Services,Inc. in opposition to pltff's motion for summary judgment.	
Nov.8-74	Filed Defts.Rule 9(g)Statement.	
Nov.18-74	Filed Pltffs Amended Complaint.	
Dec.10-74	Filed Stip&Order that pltff's motion for summary judgment returnable 10/29/74 is adjourned to 11/12/74;all papers submitted by Investors Services,Inc. in opposition to this motion shall be served not later than 11/7/74.Tenney,J.	
Dec.19-74	Filed Stip&Order that Deft.Deft.Investors Diversified Services,Ind. consents to amendment of pltff's complaint as reflected in amended complaint as served by Pltff on 11/18/74;all claims against defts contained in pltff's original complaint shall be and are dismissed with prejudice;application by made by deft.Alleghany Corp.for costs, etc.is withdrawn with prejudice; time which deft.Investors Diversified Services,Inc.may move with re: pltff's Amended complaint is extended to 12/20/74.Tenney,J.	
Dec.1[illegible]-74	Filed Memo End.on Motion of 9/19/74.Motion denied as moot.So ordered.Tenney,J.(mn)	

JUDGE TENNEY

BEST COPY AVAILABLE

Civil Docket Continuation

PROCEEDINGS

Date Order Judgment

[illegible] Filed [illegible] Motion for summary Judgment under Rule 56, FRCP. [illegible] denied as moot. So ordered. Tenney, J. (mn)

[illegible] Filed [illegible] 1/10/75.

[illegible] Filed deft. [illegible]

[illegible] Filed [illegible] of Investors Diversified Services, Inc. in support of its motion [illegible]

[illegible] Filed Answer of [illegible]

1/24/75 Filed Pltff Pro Se Affdvt & Notice of Motion for an order striking Answer of deft.

1/24/75 Filed Pltff Pro Se Statement under Rule 9(g).

1/24/75 Filed Pltff's affdvt in opposition to deft's motion to dismiss and /or for summary judgment, and in support of pltff's cross-motion for summary judgment.

1/24/75 Filed Suppl. Affdvt of Pltff Pro Se.

1/24/75 Filed Pltff's Memorandum in opposition to motion of deft. Investors Diversified Services, Inc. to dismiss and /or for summary judgment and in support of pltff's cross motion for summary judgment.

1/27/75 Filed Deft's Memorandum in opposition to motion to strike deft's answer to amended complaint.

1/27/75 Filed Affdvt in opposition to Bond for Deft. to motion by Phillips to strike IDS's answer to amended complaint, etc.

1/23/75 Filed Deft's opposition to pltff's rule 9(g) statement.

1/23/75 Filed Affdvt of Bond for deft. Investors Diversified Services, Inc. in support of Motion to dismiss and /or for summary judgment.

2/3/75 Filed Pltff Pro Se Ex Parte Application for leave to file Reply Bried and for other relief.

2/5/75 Filed Order to Show Cause re: Order vacating notice of deposition to depose deft. Investors Diversified Services, Inc., etc. ret. 2/7/75, 10:00 A.M. Rm 7.

2/7/75 Filed Pltff Pro Se Affdvt & Notice of Motion for an order disqualifying R.L. Bond for Deft. from appearing as atty and preliminarily & permanently enjoining him from so doing.

2/7/75 Filed Pltff's Memorandum in support of motion under rule 5(b)(4).

2/7/75 Filed " Notice of Deposition of Deft.

2/5/75 Filed Suppl. Affdvt of R.L. Bond for Deft.

2/10/75 Filed Reply Memorandum of Pltff in opposition to motion of deft. to dismiss and/ or for summary judgment & in support of pltff's cross-motion for summary judgment & in support of pltff's motion under rule 11, FRCP

2/13/75 Filed Affdvt of Pltff.

2/13/75 Filed IDS's affdvt. re: opposition to motions of pltff.

2/13/75 Filed IDS's memo. of law re: opposition to motions of pltff.

2/13/75 Filed Answering Affdvt of Pltff & Application for rehearing prior to entry of order.

2/13/75 Filed Order to Show Cause to vacate order & adjudge counsel in contempt. ret. 2/[illegible]/75, Room 506, 10:30 A.M.

2/13/75 Filed Memo End. on Order to Show Cause of 2/5/75. Proclamation made this date in open court. Default noted and pltff ordered to pay $100. attys' fee plus costs as indicated on the record. SUBMIT ORDER IN ACCORDANCE WITH THIS ENDORSEMENT. Tenney, J. (mn)

[illegible] Filed Deft Response to Pltff's Reply Papers.

[illegible] Filed Pltff (Pro Se) Notice of Application for a stay & other relief ret. 2/28/75.

[illegible] Filed Memorandum of Pltff (Pro Se) in support of application for a stay pending determination of motion to disqualify.

[illegible] Filed ORDER. Notice of deposition served by pltff on 1/31/75 to depose deft. by [illegible] commending on 2/[illegible]/75 is vacated; notice of deposition by pltff to depose deft. [illegible] Grinnell on [illegible]/11/75 is vacated. Ordered: pltff is stayed from [illegible] any pre-trial discovery until 10 days after service of notice of entry of order by Deft. to dismiss and /or for summary judgment & by [illegible]

(cont'd pg 5)

[illegible] v. INVESTORS DIVERSIFIED SERVICES, INC. 72 Civ. 1544

	PROCEEDINGS pg. 3	Date of Judgment
2/19/7[illegible]	[illegible] for summary judgment and to strike answer of D-II:ordered that [illegible] 30 days after service upon of conformed copy of order, shall pay to deft. [illegible] costs, etc. ordered that pltff is prohibited from communicating, etc. with Deft. or Alleghany Corp, etc. Tenney, J. (m..)	
2/19/7[illegible]	Filed [illegible] opposition to order noticed for settlement by deft.	
2/21/7[illegible]	Filed [illegible]	
2/25/7[illegible]	Filed [illegible] affidvt by Richard L. Bond for deft IDS in opposition to motion by pltff for an order staying all proceedings until final determination of pltff's motion to disqualify Bond [illegible] for deft IDS	
2/25/75	Filed [illegible] IDS Opposition Memorandum of Law.	
2/27/75	Filed Pltff(Pro Se) Notice of Appeal from Order of 2/18/75 prohibiting Pltff from communicating, orally or in writing with Deft or Alleghany Corp, etc. (mailed notice to Richard L. Bond of Marshall, Bratter, Greene, Allison&Tucker on 2/28/75)	
06-11-75	Filed true copy of motion filed 5/20/75 to dismiss appeal from USDC, SDNY for lack of jurisdiction with costs and for failure to comply with FR Appellate Procedure. Docketed as Judgment #75,519. Clk. Bill of Costs in sum of $25,20.	
6-30-75	Filed ORDER that pltff.'s appeal is dismissed and that this cause hereby is restored to the docket of this Court for further proceedings, and that deft. Investors Diversified Services, Inc. have execution for costs as taxed by the Court of Appeals in the sum of $25,20. Tenney, J.	
2-17-76	Filed Memorandum & Order for the reasons stated all of pltff's motions are denied & summary judgment is granted in favor of deft. Tenney J. m/n copy to pltff pro se.	
12-20-76	Filed Judgment deft to have judgment against pltff dismissing the Action. Clerk. m/n copy to pltff pro se	
01-14-77	Fld Notice of Appeal by pltff to the U.S.C.A from the order of 12-20-76, copy to all parties.	

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
By J P [illegible]
Deputy Clerk

J P Tan[illegible]

4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Filed April 14 '72

RANDOLPH PHILLIPS,

Plaintiff,

-against-

INVESTORS DIVERSIFIED SERVICES, INC.
and ALLEGHANY CORPORATION,

Defendants.

COMPLAINT

72 Civil Action No.
1544

1. Plaintiff Randolph Phillips is a citizen of the State of New York and defendant Investors Diversified Services, Inc. is a corporation incorporated under the laws of the State of Minnesota with its principal office in that State. Alleghany Corporation was plaintiff and Randolph Phillips a defendant in 60 Civil Action 3511 in this Court and by reason of said facts this Court has inherent jurisdiction over said corporation and the subject matter herein. The amount in controversy, exclusive of interest and costs, exceeds $10,000.00.

2. On September 8, 1960 a complaint was filed in this Court in the name of John D. Murchison, Clint W. Murchison, Jr. and Gerard Fossland, plaintiffs, against Allan P. Kirby, Randolph Phillips, Charles T. Ireland, Jr., Fred M. Kirby et al., 60 Civil Action 3511. On or about September 8, 1960 a similar complaint was filed in the Supreme Court of the State of New York, County of New York, in the name of Theodore Freeman et ano. against the same defendants (except Fred M. Kirby), Index No. 13114/60; and a duplicate thereof in this Court, 60 Civil Action No. 3502. All of said 3 actions were alleged as derivative actions on behalf of Alleghany Corporation. At the time of the institution of said actions said Corporation was under the control of Allan P. Kirby, and his nominees, including Charles T. Ireland, Jr.

3. Plaintiff herein was served and appeared as a defendant in all of the 3 aforesaid civil actions.

4. At the time of the institution of the said 3 actions plaintiff herein was a director of defendant Investors Diversified Services, Inc., serving upon the nomination of defendant Alleghany Corporation, and was sued in his role as director of said corporation and also as a fiduciary for the common stockholders thereof as well as of Alleghany Corporation, which then and now controlled IDS.

5. On April 8, 1961 a judgment was entered in this Court dismissing 60 Civil 3502.

6. After trial on the merits 60 Civil 3511 was dismissed as to plaintiff herein by final judgment entered on June 5, 1963, pursuant to an Opinion of this Court reported as Alleghany Corporation v. Allan P. Kirby, Randolph Phillips, Charles T. Ireland, Jr. and Fred M. Kirby, 218 F. Supp. 164. Prior thereto the Alleghany Corporation was substituted by order of this Court as plaintiff in place of the original plaintiffs Murchison and Fossland.

7. No appeal was taken by plaintiff Alleghany Corporation from that part of the aforesaid final judgment dismissing the action against plaintiff herein (Randolph Phillips) but an appeal was taken by Alleghany Corporation from that part of the final judgment dismissing the complaint against defendants Kirby and Ireland.

8. Under date of June 5, 1963 the law firm of Donovan Leisure Newton & Irvine by Robert M. Loeffler wrote a letter to Mr. Michael Genovese, Judgment Clerk of this Court, with respect to the judgment to be entered in 60 Civil 3511, stating:

> "It is requested that language as follows be added to the judgment which you prepare:

> 'Jurisdiction is retained for the purpose of hearing and determining applications for reimbursement for costs and expenses, including attorneys' fees, incurred by defendants.'

"Defendants have certain rights to indemnification and reimbursement under the By-Laws of Alleghany Corporation and the statutes of New York and Maryland. While we believe that the defendants would be entitled to assert those rights either by independent action or by application to this Court in this action, regardless of express provision thereof in the judgment, we believe that the inclusion of the above language in the judgment is nevertheless appropriate as confirming the continuing jurisdiction by this Court to entertain applications with respect to such rights."

9. Attorney Loeffler's letter is marked"Copies to Hon. Archie O. Dawson Townley, Updike, Carter & Rodgers Kissam & Halpin Mr. Randolph Phillips."

10. By said letter the law firm of Donovan Leisure Newton & Irvine acknowledged and recognized that plaintiff herein as one of the defendants in said 60 Civil Action 3511 had "certain rights to indemnification and reimbursement for costs and expenses, including attorneys' fees, incurred by defendants."

11. In reliance thereupon plaintiff herein filed in this Court an application for an order directing Alleghany Corporation to pay to him the sum of $94,950.00 as reasonable expenses necessarily incurred in connection with his successful defence of 60 Civil Action 3511, pursuant to Notice of Motion and supporting affidavit dated and sworn to September 21, 1964, together with a memorandum of law.

12. After the service and filing of said application, Stuart N. Updike, Esq., attorney for Alleghany Corporation and who had been appointed as such during the control of said corporation by John D. and Clint W. Murchison, Jr., advised plaintiff herein that his client's position with respect to said application would be determined by the incumbent Kirby management of the corporation and that he would

take his instructions from Charles T. Ireland, Jr., then President of the corporation and an attorney for it and representative of Allan P. Kirby, Sr., who owned with his associates the controlling stock interest therein.

13. Plaintiff thereupon conferred with Mr. Ireland and with Carl E. Newton, Esq. and Roy W. McDonald, Esq., members of the firm of Donovan Leisure Newton & Irvine, which firm then and now are attorneys for Alleghany Corporation, IDS and the Kirby family. Mr. McDonald, as chief attorney for defendants Kirby in 60 Civil Action 3511 and the related litigations, agreed that plaintiff's statement as set forth in said affidavit in Exhibit A thereto of "Dates of Depositions and Court Appearances" was correct; that the statement of 1899 hours expended, as set forth at page 4 of said affidavit, was a fair statement, and both Messrs. Newton and McDonald agreed with the aforesaid representation to the Judgment Clerk of this Court by Robert M. Loeffler, Esq. and that my request for reimbursement at the rate of $50 per hour was a modest and fair and reasonable request. Mr. Ireland, however, advised me, after consultation with said law firm, that in view of the then pendency of an appeal as to defendants Allan P. Kirby, Fred M. Kirby and himself in 60 Civil Action 3511, Alleghany Corporation under the control of said defendants, in view of the prior charges of fraud and collusion between myself and said Allan P. Kirby and Ireland, desired to avoid taking any position in this Court with respect to said application until all the charges against all the defendants in 60 Civil 3511 had been finally dismissed, but that if I would withdraw the application to this Court, Alleghany Corporation and if not Alleghany Corporation, then IDS, would pay me the aforesaid requested sum after the final determination of the litigation then pending.

14. Plaintiff herein thereupon agreed thereto and withdrew his application on the basis of said understanding and agreement.

15. On October 13, 1964, in reliance upon and in accordance with said agreement, plaintiff herein withdrew said motion for said order by this Court, and this Court by endorsement stated "Oct. 13th 1964. This motion is withdrawn by stipulation. So Ordered. Irving Ben Cooper USDJ."

16. Subsequently the decision reported at 218 F. Supp. 164 dismissing the case as to defendants Kirby and Ireland was affirmed on appeal (*Alleghany Corporation* v. *Kirby et al.*, in banc 340 F. 2d 311 (1965), cert. dismissed as improvidently granted, sub nom. *Holt* v. *Kirby et al.*, 384 U. S. 28 (1966); *Smith* v. *Fitzsimmon et al.*, 394 F. 2d 381 (1968); and *Most* v. *Kirby et al.*, USDC SDNY 66 Civil 962, dismissed by order entered February 17, 1970.)

17. By letter dated June 16, 1970 to Alleghany Corporation and Investors Diversified Services, Inc., plaintiff herein stated that "the condition of the oral agreement of October 13, 1964 having now come into effect, I respectfully request that Alleghany Corporation and/or Investors Diversified Services, Inc. pay to me the aforesaid sum of $94,950.00 plus 6% interest compounded annually from October 13, 1964 to date."

18. By letter dated November 30, 1970 on the letterhead of Donovan Leisure Newton & Irvine, John E. Tobin, Esq. of said firm wrote plaintiff "on behalf of Alleghany Corporation and Investors Diversified Services, Inc., and at the request of Mr. F. M. Kirby, Chairman of the board of both companies." "Please be advised,"

stated Mr. Tobin, "that neither company recognizes the claim for compensation which was embodied in your letter of some months ago to both companies."

19. The aforesaid denial of plaintiff's claim constitutes a breach of the aforesaid oral contract of October 13 1964 and of the statutory rights of plaintiff as represented to this Court by the aforesaid letter of Donovan Leisure Newton & Irvine dated June 5, 1963.

WHEREFORE, plaintiff demands judgment against Alleghany Corporation and/or Investors Diversified Services, inc. in the amount of $94,950.00 plus 6% interest compounded annually from October 13, 1964, to date, of the judgment herein.

RANDOLPH PHILLIPS
Plaintiff Pro Se
30 East 72nd Street
New York, N.Y. 10021

DEMAND FOR TRIAL BY JURY

Plaintiff hereby demands a trial by jury of every issue herein triable of right by a jury.

RANDOLPH PHILLIPS

SUMMONS IN A CIVIL ACTION

CIV. 1 (2-61)
(Formerly D. C. Form No. 45 Rev. (6-49))

7

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

72 CIVIL ACTION FILE NO. ~~1455~~
1544

RANDOLPH PHILLIPS

Plaintiff

v.

~~ALLEGHANY CORPORATION and~~
INVESTORS DIVERSIFIED SERVICES, INC.,

Defendants

(ADDITIONAL)
SUMMONS

To the above named Defendant :

You are hereby summoned and required to serve upon

Randolph Phillips

plaintiff's attorney , whose address is

30 East 72nd Street
New York, N. Y. 10021

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

John Livingston
Clerk of Court.

~~[illegible]~~
Deputy Clerk.
E. A. Becker

[Seal of Court]

MAY 15, 1972

Date: ~~April [illegible] 1972~~

Note:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - x

RANDOLPH PHILLIPS, :

Plaintiff, :

-against- : 72 Civ. 1544

INVESTORS DIVERSIFIED SERVICES, INC. and ALLEGHANY CORPORATION, : ORDER EX PARTE

Defendants. :

- - - - - - - - - - - - - - - - - - x

Upon the annexed affidavit of Richard L. Bond, Esq., sworn to on May 10, 1972, and good cause shown for the relief requested therein,

NOW, on motion of Marshall, Bratter, Greene, Allison & Tucker, attorneys for defendant Alleghany Corporation, it is hereby

ORDERED, that the time of defendant Alleghany Corporation to answer or to make any motion with respect to the complaint in this action be and the same is hereby extended to and including the 2nd day of June, 1972; and it is further

ORDERED that, sufficient reason appearing therefor, the service of a copy of this Order, and all papers on which it is granted, on Mr. Randolph Phillips, the plaintiff, pro se, herein at 30 East 72nd Street, New York, New York 10021 on or before the 15th day of May, 1972, be deemed sufficient.

Dated: New York, New York
May 10, 1972

S/ MORRIS E. LASKER
U.S.D.J.

EXhibIT "A"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - x

RANDOLPH PHILLIPS, :

Plaintiff, :

-against- :

INVESTORS DIVERSIFIED SERVICES, :
INC. and ALLEGHANY CORPORATION, :

Defendants. :

- - - - - - - - - - - - - - - - - - x

72 Civ. 1544

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

RICHARD L. BOND, being duly sworn, deposes and says:

1. I am a member of Marshall, Bratter, Greene, Allison & Tucker, attorneys herein for defendant Alleghany Corporation. This affidavit is made in support of an application for an *ex parte* order extending the time within which defendant Alleghany Corporation may move with respect to or answer the complaint herein from May 10, 1972 to June 2, 1972. On information and belief, the other named defendant, Investors Diversified Services, Inc., has not yet been served with process.

2. My firm was retained to represent Alleghany Corporation in this action in the afternoon of May 9, 1972. I am advised that defendant Alleghany Corporation was served with summons and complaint on April 20, 1972. Accordingly, absent an extension, its time to move or answer expires on May 10, 1972.

3. Plaintiff, Randolph Phillips, has appeared herein *pro se*. Immediately following my retention yesterday afternoon, I unsuccessfully sought to reach Mr. Phillips by telephone to request an extension of time. My efforts to reach Mr. Phillips today also have been unsuccessful, and my secretary was advised this mornin that Mr. Phillips is in Washington, D.C. today. Accordingly, it is impossible to obtain an extension for defendant Alleghany Corporation except by *ex parte* order of the Court.

4. The complaint herein, a copy of which is annexed as Exhibit A hereto, shows that plaintiff's purported claim relates to a supposed right of indemnification from the corporate defendants for his costs, expenses and his own time incurred in Phillips' *pro se* defense of himself in prior litigation where, according to plaintiff, he "was sued in his role as director" of defendant Investors Diversified Services, Inc. The complaint affirmatively alleges that the prior litigation, from which his present claim allegedly arises, was finally disposed of as to Phillips on June 5, 1963. Therefore, the claim raised by the instant action relates to indemnification to which Mr. Phillips allegedly became entitled nearly eight years ago.

5. The prior litigation, upon which Mr. Phillips present claim is based, is described in the complaint herei as having been extraordinarily time-consuming. This prior litigation is described in *Alleghany Corporation v. Kirby, et al.*, 218 F.Supp. 164 (S.D.N.Y. 1963), *affirmed en banc*,

340 F.2d 311 (2d Cir. 1965), cert. dismissed as improvidently granted, sub. nom. Holt v. Kirby, et al., 384 U.S. 28 (1966). In order to move with respect to or answer the complaint herein, it is essential that my firm familiarize itself with the extensive record in the prior litigation.

6. Moreover, I believe that there are numerous legal deficiencies in the instant complaint, which will require substantial research in order to properly prepare a motion on behalf of Alleghany Corporation to dismiss the complaint.

7. For the reasons above stated, it is respectfully urged that an extension from May 10, 1972 to June 2, 1972, of Alleghany Corporation's time within which to move or answer is necessary and appropriate and cannot possibly prejudice plaintiff's prosecution of his eight year old purported claim.

8. No prior application has been made for the relief herein sought, nor has any prior extension of the time of defendant Alleghany Corporation to move or answer been obtained by agreement with plaintiff.

Richard L Bond

Richard L. Bond

Sworn to before me this
10th day of May, 1972.

Notary Public

BEVERLY SUE [illegible]
NOTARY PUBLIC, State of New York
No. 31-[illegible]7890
Qualified in New York County
Commission Expires March 30, 19[illegible]

U.S. DISTRICT COURT
FILED
MAY 12 1972
S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RANDOLPH PHILLIPS,

Plaintiff,

-against-

RP ~~INVESTORS DIVERSIFIED SERVICES, Inc.~~
~~and~~ ALLEGHANY CORPORATION,

Defendant~~s~~.

----

72 Civil Action 1544

JUDGMENT # 72,542

This action having been commenced by the filing of the Complaint and the issuance of a summons on the 14th day of April, 1972, and a copy of the summons and complaint having been duly served on defendant Alleghany Corporation on the 20th day of April, 1972 by a Deputy United States Marshal, and the said summons with proof of service having been filed in this Court in the office of the Clerk on the 11th day of May, 1972, and the said defendant not having appeared, answered or made any motion with respect to the complaint herein, and the time for defendant to appear, answer or otherwise move having expired, and Investors Diversified Services, Inc., not having been served,

RP

Now on motion of Randolph Phillips, plaintiff and attorney pro se, it is

ORDERED, ADJUDGED and DECREED that the plaintiff have judgment against the defendant Alleghany Corporation for the liquidated amount of $94,950, together with interest at 6% from October 13, 1964, amounting to $42,727, and together with costs and disbursements amounting to $19.32, amounting in all to the sum of $137,696.82.

Dated: New York, N.Y.
May ~~11~~, 1972
12

CLERK

~~9a~~

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RANDOLPH PHILLIPS, Plaintiff, -against- INVESTORS DIVERSIFIED SERVICES, Inc. and ALLEGHANY CORPORATION, Defendants.	72 Civil Aaction 1544 AFFIDAVIT for JUDGMENT by DEFAULT

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:
SOUTHERN DISTRICT OF NEW YORK)

RANDOLPH PHILLIPS, being duly affirmed, deposes and says: I am the plaintiff in the above-entitled action, attorney pro se, and as such in charge of and familiar withall the facts in the above entitled action,

That this Court has jurisdiction pursuant to Rule 55 of the Federal Rules of Civil Procedure.

That this action was commenced on April 14, 1972 by the filing of the Complaint and the issuance of a summons; that thereafter on April 20, 1972 said summons and complaint were duly served on defendant Alleghany Corporation at its offices 350 Park Avenue, New York, N.Y., and that thereafter on May 11, 1972 the summons together with the proof of service was duly filed with the Clerk of this Court.

That the defendant has not answered or made any motion with respect to the Complaint herein, and the time to answer, appear or otherwise move having expired and the defendant Alleghany Corporation is now in default for failure to answer, appear or move or plead herein,

That the amount shown by the statement attached hereto is for a liquidated amount justly due and owing and that no part thereof has been paid, that the disbursements sought to be taxed in this action were necessarily made or incurred therein,

WHEREFOR, it is prayed that the Clerk of this Court note and enter the annexed judgment against the said defendant Alleghany Corporation.

Affirmed to before me this
11th day of May, 1972.

Randolph Phillips
RANDOLPH PHILLIPS

Original in Record
in Docket 74-2188

4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RANDOLPH PHILLIPS,

Plaintiff,

-against-

C.P. INVESTORS ~~DIVERSIFIED SERVICES, Inc.~~,
~~and~~ ALLEGHANY CORPORATION,

Defendant.

72 Civil Action 1544

CLERK'S CERTIFICATE
NOTING DEFAULT

I, John Livingston, Clerk of the United States District Court for the Southern District of New York, do hereby certify that the docket entries in the above-captioned case indicate that the summons and complaint were filed on April 14, 1972, that the defendant Alleghany Corporation was served with a copy of the complaint and summons on April 20, 1972.

I further certify that the docket entries indicate that the defendant has not filed an answer or has otherwise moved with respect to the complaint herein, and the time to answer or move with respect to said complaint has expired. The default of the defendant is hereby noted.

Dated: New York, N. Y.
May ~~[illegible]~~, 1972.
12

John Livingston
JOHN LIVINGSTON, Clerk

~~7~~

Original in Record in Docket 74-2188

5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Filed MA
5/16/72

RANDOLPH PHILLIPS,	:	72 Civ. 1544
Plaintiff,	:	
-against-	:	**ORDER TO SHOW CAUSE**
INVESTORS DIVERSIFIED SERVICES, INC. AND ALLEGHANY CORPORATION,	:	
Defendants.	:	

Upon the annexed affidavits of Richard L. Bond, Esq., Beverly Collier and Michael Taubin, duly sworn to on the 15th day of May, 1972, and the exhibits annexed thereto, and upon reading the complaint herein, the Order Ex Parte of The Honorable Morris E. Lasker dated May 10, 1972 extending defendant Alleghany Corporation's time to move or answer from May 10, 1972 until June 2, 1972, and the affidavit of Richard L. Bond, Esq. sworn to May 10, 1972 submitted in support thereof, and upon the Judgment by Default dated May 12, 1972 entered against defendant Alleghany Corporation and upon all prior proceedings had herein,

LET plaintiff, Randolph Phillips show cause before this Court, in Room 506, United States Courthouse, Foley Square, New York, New York, on the 18th ~~16~~ day of May, 1972, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard,

WHY an Order should not be entered:

(1) pursuant to Rules 55(c) and

* Clerical error changed by Bond pursuant to Judge Frankel's telephonic authorization

60(b) of the Federal Rules of Civil Procedure setting aside the entry of default against defendant Alleghany Corporation herein and relieving defendant Alleghany Corporation of the Judgment by Default (#72,542) entered against it herein on May 12, 1972,

(2) ordering plaintiff to pay defendant Alleghany Corporation costs upon the instant motion together with an allowance for reasonable attorney's fees,

(3) staying all further proceedings by plaintiff herein until such time as he either appears by an attorney or specifies persons to whom papers can be delivered at 30 East 72nd Street, New York, New York, for service in compliance with Rule 5(b) of the Federal Rules of Civil Procedure, and

(4) such other and further relief as to the Court seems just and proper.

IT IS ORDERED that, pending the hearing and determination of this Motion, the Clerk of the Court is directed to issue no execution upon the aforesaid Judgment by Default, Judgment #72,542, and

IT IS FURTHER ORDERED that, pending the hearing and determination of this Motion, plaintiff is enjoined and restrained from taking any act to execute upon or otherwise enforce the aforesaid Judgment by Default, and

IT IS FURTHER ORDERED, good cause having been shown, that service of a copy of this Order and the papers upon which it is based upon plaintiff by either personal service or the leaving of a copy of said papers with the doorman or anyother person of suitable age or discretion at the address listed by plaintiff upon the complaint, 30 East 72nd Street, New York, New York, MEF And by certified mail, special delivery on or before 7:00 o'clock pm on the 15th day of May, 1972, shall be deemed good and sufficient service hereof.

Dated: New York, New York
May 15, 1972
4:50 PM

/s/ Marvin E. Frankel
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

RANDOLPH PHILLIPS, : 72 Civ. 1544

Plaintiff, :

-against- : **AFFIDAVIT**

INVESTORS DIVERSIFIED SERVICES, :
INC. AND ALLEGHANY CORPORATION,

:

Defendants.

:

- x

STATE OF NEW YORK)
)SS.:
COUNTY OF NEW YORK)

RICHARD L. BOND, being duly sworn, deposes and says:

1. I am a member of the firm of Marshall, Bratter, Greene, Allison & Tucker, attorneys herein for defendant Alleghany Corporation. This affidavit is made in support of the motion of Alleghany, brought on by Order to Show Cause, for an order pursuant to Rules 55(c) and 60(b) of the Federal Rules of Civil Procedure setting aside the entry of default entered against Alleghany Corporation and relieving Alleghany Corporation of the Judgment by Default entered in favor of plaintiff Randolph Phillips on May 12, 1972 upon the grounds that the entry of default and the Judgment by Default were improperly entered and are void by reason of the Order Ex Parte by The Honorable Morris E. Lasker on May 10, 1972, extending the time of defendant Alleghany Corporation to move or answer from May 10, 1972 until June 2, 1972.

2. On the afternoon of May 9, 1972, my firm was

retained to represent Alleghany Corporation in this action. I was advised that Alleghany Corporation was served with a summons and complaint on April 20, 1972. Accordingly, absent an extension, its time to move or answer would have expired on May 10, 1972. Upon information and belief, the other named defendant, Investors Diversified Services, Inc., has not yet been served with process.

3. Plaintiff Randolph Phillips is appearing herein pro se. At approximately 5:15 P.M. on May 9, 1972, immediatel following my retention, I called Mr. Phillips at RE-7-0244, one of the telephone numbers listed on his complaint, to request an extension of time. My telephone call was answered by an unidentified female who advised that Mr. Phillips was not at home and further advised that Mr. Phillips was currently on route to another location and would be there shortly. This unidentified female advised as to the telephone number of this other location, which is the other number listed by Mr. Phillips on his complaint, RE-4-6776. I tried on at least four occasions in the late afternoon and evening of May 9, 1972, to reach Mr. Phillips at this new number and at his othe number, but all my calls went unanswered.

4. As set forth in the affidavit of my secretary, Beverly Collier, submitted in support of the instant motion, on the morning of May 10, 1972, Mrs. Collier telephoned Mr. Phillips at 30 East 72nd Street and advised the female who answered that Mr. Richard Bond was calling Mr. Phillips in connection with Alleghany Corporation, and that it was urgent that I speak with Mr. Phillips. Mrs. Collier was advised that Mr. Phillips was in Washington D.C. for the day, that there

was no number at which he could be reached but that she expected Mr. Phillips to telephone her within an hour and she would transmit the message.

5. After waiting in vain for several hours for Mr. Phillips to return my telephone call, my firm proceeded to prepare an Order Ex Parte and supporting affidavit, to extend the time of defendant Alleghany Corporation to move or answer from May 10, 1972 until June 2, 1972. At approximately 4:00 o'clock in the afternoon of May 10, 1972, The Honorable Morris E. Lasker approved said Order Ex Parte, a conformed copy of which is annexed hereto as Exhibit "A". The Order Ex Parte provided for service upon plaintiff on or before May 15, 1972.

6. The following morning, at 10:30 A.M., on May 11, 1972, as set forth in the accompanying affidavit of Michael Taubin, of the managing clerk's office of my firm, Mr. Taubin appeared at Mr. Phillips' address listed on his complaint, 30 East 72nd Street, New York, New York, to effectuate service of the aforesaid Order of Judge Lasker. Mr. Taubin advised the doorman at the building that he was from Marshall, Bratter, Greene, Allison & Tucker, and that he wished to see Mr. Philli and that he had court papers to serve. The doorman immediatel placed a telephone call after which he advised that Mr. Phillips' wife had instructed him to advise that Mr. Phillips could be presently found at his office at 3 East 78th Street. Mr. Taubin proceeded immediately to said address and rang the door bell of the apartment there listed for Mr. Phillips. Mr. Taubin received no response. At approximately 11:30 A.M., upon his return to our offices, Mr. Taubin mailed a copy of

Judge Lasker's Order, together with all papers upon which it was granted, to Mr. Phillips at 30 East 72nd Street, New York, New York. A copy of the return of service is annexed to Exhibit "A" hereto.

7. At approximately noon on May 11, 1972, Mr. Phillips telephoned and was advised by my secretary that I was in conference in another part of the office but that if Mr. Phillips would leave his telephone number, I would return his call within 20 minutes. Mr. Phillips refused to leave a telephone number and further advised that he would call again in five minutes. No such call from Mr. Phillips ever was received.

8. In the early afternoon of May 11, 1972, a conformed copy of the May 10, 1972 Order by Judge Lasker with Proof of Service was duly filed with the Clerk of the District Court.

9. Upon arrival in my office in the morning of May 12, 1972, I received a message from my switchboard that a Mr. Phillips had called at 6:05 P.M. on May 11, 1972. Mr. Phillips did not leave a return number.

10. On May 12, 1972, a Judgment by Default (Judgment #72,542) was entered herein against defendant Alleghany Corporation in the amount of $137,696.82. A copy of the Judgment by Default and the papers upon which it was entered are annexed hereto as Exhibit "B".

11. It should be stressed that the Clerk's Certificate Noting Default dated May 12, 1972 was certified in error.

The Order Ex Parte approved by Judge Lasker on May 10, 1972, with Proof of Service, extending defendant Alleghany Corporation's time to move or answer was filed and duly docketed on May 11, 1972.

12. Upon learning, during the afternoon of May 12, 1972, of the entry of the Judgment by Default, I immediately telephoned Mr. Phillips to request that he voluntarily relieve defendant Alleghany Corporation from the Judgment by Default, which obviously never should have been entered. The individual with a female voice who answered my call advised that Mr. Phillips would be home within five minutes and that he would return my call. No return telephone call from Mr. Phillips ever was received. I specifically instructed my firm's switchboard operator to immediately telephone me if Mr. Phillips called, and she advised me at 9:00 P.M. that evening that he had not returned my call.

13. On Monday morning, May 15, 1972, I again telephoned Mr. Phillips and requested, in view of Judge Lasker's timely order extending Alleghany Corporation's time to move or answer, that he stipulate to vacating the Judgment by Default which was improperly entered. Mr. Phillips said that he would do so only if I agreed to vacate the Order Ex Parte signed by Judge Lasker which extended Alleghany Corporation's time to move or answer. I pointed out to Phillips that this would once again put my client technically in default and therefore I could not do so. Phillips then told me to proceed as I wished. I advised Phillips that I intended to move by order to show cause, today if possible, to vacate the Judgment by Default he had obtained against Alleghany Corporation. Phillips said

he wanted to be heard on such an application; that he was unavailable today but might be free tomorrow if he did not go to Washington, D.C.

14. Based upon the foregoing, it appears that Mr. Phillips intentionally declined to return my telephone calls on May 9 and 10, despite the stated urgency and the fact that I was calling concerning defendant Alleghany Corporation. The run-around my office received on May 11, 1972, when we sought to personally serve a copy of Judge Lasker's May 10 Order, curiously was the same day that Phillips' papers in support of a Judgment by Default are dated. Moreover, his extraordinary refusal to stipulate to vacating the Judgment by Default, despite his knowledge of the improper circumstances of its entry, makes it apparent that Phillips is simply trying to make this litigation as expensive and difficult as possible for Alleghany Corporation, without regard to reason or propriety, and his conduct warrants the award to Alleghany Corporation of reasonable attorneys' fees and costs in connection with the instant motion.

15. This motion was brought on by order to show cause to prevent Mr. Phillips from executing upon or otherwise attempting to enforce a Judgment by Default improperly obtained. Obviously, there should not be outstanding against Alleghany Corporation an unsatisfied judgment, or any judgment at all, under the circumstances existing here.

16. Mr. Phillips should be required to obtain an attorney to represent him herein, or at the least to make it possible for papers to be served by hand upon him when he is

absent from his apartment or otherwise chooses not to be available. Neither defendant nor the Courts should again be burdened with problems of this kind in this litigation. Accordingly, it is urged that an order be entered staying all further proceedings by plaintiff herein until he either appears by counsel or designates a satisfactory manner for effecting service of papers.

17. No prior application has been made for the relief sought by this motion.

Dated: New York, New York
May 15, 1972

Richard L Bond
RICHARD L. BOND

Sworn to before me this
15th day of May, 1972.

Michael H. Graham
NOTARY PUBLIC

MICHAEL H. GRAHAM
Notary Public, [illegible] of New York
No. 30-[illegible]2[illegible]
Certificate filed in New York County
Commission Expires March 30, 1973

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

RANDOLPH PHILLIPS, : 72 Civ. 1544

Plaintiff, :

-against- : **AFFIDAVIT**

INVESTORS DIVERSIFIED SERVICES, :
INC. AND ALLEGHANY CORPORATION,
:
Defendants.
:

- X

STATE OF NEW YORK)
)SS.:
COUNTY OF NEW YORK)

BEVERLY COLLIER, being duly sworn, deposes and says:

1. I am presently employed by the firm of Marshall, Bratter, Greene, Allison & Tucker, in the capacity as secretary to Richard L. Bond, Esq.

2. On the morning of May 10, 1972, I telephoned Mr. Phillips at 30 East 72nd Street and advised the female who answered that Mr. Richard Bond was calling Mr. Phillips in connection with Alleghany Corporation, and that it was urgent that Mr. Bond speak with Mr. Phillips. I was advised that Mr. Phillips was in Washington D.C. for the day, that there was no number at which he could be reached but that she expected Mr. Phillips to telephone her within an hour and she would transmit the message.

3. At approximately noon on May 11, 1972, Mr. Phillips telephoned. I advised that Mr. Bond was in confer-

ence in another part of the office, but that if Mr. Phillips would leave his telephone number, Mr. Bond would return his call within 20 minutes. Mr. Phillips refused to leave a telephone number and further advised that he would call again in five minutes, which Mr. Phillips did not do.

Beverly Collier
BEVERLY COLLIER

Sworn to before me this
15th day of May, 1972.

Michael H. [illegible]
NOTARY PUBLIC

MICHAEL H. [illegible]
Notary Public, State of New York
No. [illegible]
Certificate filed in New York County
Commission expires March 30, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - X

RANDOLPH PHILLIPS, : 72 Civ. 1544

Plaintiff, :

-against- : AFFIDAVIT

INVESTORS DIVERSIFIED SERVICES, :
INC. AND ALLEGHANY CORPORATION,
:
Defendants.
:

- - - - - - - - - - - - - - - - - - X

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

MICHAEL TAUBIN, being duly sworn, deposes and says:

1. I am presently employed by the firm of Marshall, Bratter, Greene, Allison & Tucker, in the managing Clerk's office.

2. At 10:30 A.M., on May 11, 1972, I appeared at Mr. Phillips' address listed on his complaint, 30 East 72nd Street, New York, New York, to effectuate service of an Order of Judge Lasker. I advised the doorman at the building that I was from Marshall, Bratter, Greene, Allison & Tucker, and that I wished to see Mr. Phillips and that I had court papers to serve. The doorman immediately placed a telephone call after which he advised that Mr. Phillips' wife had instructed him to advise that Mr. Phillips could be presently found at his office at 3 East 78th Street. I proceeded immediately to said address and rang the door bell of the apartment there listed for Mr. Phillips. There was no response. At approxi-

mately 11:30 A.M., upon my return to my office, I mailed a copy of Judge Lasker's Order, together with all papers upon which it was granted, to Mr. Phillips at 30 East 72nd Street, New York, New York.

Michael Taubin
MICHAEL TAUBIN

Sworn to before me this
1[illegible] day of May, 1972.

NOTARY PUBLIC

MICHAEL W. [illegible]
Notary Public, State of New York
No. 30-6[illegible]21730
Certificate filed in New York County
Commission Expires March 30, 197[illegible]

ENTERED IN DOCKET

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

RANDLOPH PHILLIPS,
Plaintiff,
-against-
INVESTORS DIVERSIFIED SERVICES, INC. and ALLEGHANY CORPORATION,
Defendants.

- x

72 Civ. 1544

REPLY AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

RICHARD L. BOND, being duly sworn, deposes and says:

1. I am a member of Marshall, Bratter, Greene, Allison & Tucker, attorneys herein for defendant Alleghany Corporation, and make this affidavit in reply to the answering affidavit, dated May 24, 1972, by plaintiff Randolph Phillips ("Phillips Affidavit"), in opposition to Alleghany Corporation's motion to vacate a default judgment entered against it herein and for certain other relief.

2. The motion by Alleghany Corporation was brought on by order to show cause, signed on May 15, 1972, by the Honorable Marvin E. Frankel, and initially was returnable on May 18, 1972. At the return on May 18, Judge Frankel adjourned the motion to May 25, 1972, and directed plaintiff to serve answering papers not later than Monday, May 22, 1972.

3. On May 22, 1972, Mr. Phillips did not serve papers in opposition to the motion. Instead, there was sent to Judge Frankel a letter dated May 22, 1972, purportedly from Mr. Phillips' physician, which stated, inter alia, that Phillips "had a severe attack of coronary insufficiency" on the previous day, that Phillips' physician "instructed him that he is to make no effort to meet" the May 22 deadline for answering papers, and that Phillips would "serve and file his papers on Wednesday [May 24, 1972]." A copy of this letter is Exhibit A hereto.

4. Mr. Phillips telephoned me late in the day on Tuesday, May 23, 1972. Insofar as here pertinent, he asked whether, in view of the letter from his doctor, I would agree to accept service on Wednesday, May 24, of his answering papers and whether such exhibits as he did not attach to his answering affidavit could be served later, with a reasonable time thereafter for me to file reply papers. I urged Mr. Phillips to adjourn the motion, which he declined to do, and finally agreed to accept answering papers in accordance with the schedule Phillips had suggested. Immediately after the May 23 telephone conversation with Mr. Phillips, I dictated a memorandum of the conversation and on the following day sent Mr. Phillips a copy of my memorandum of our telephone conversation. Copies of my May 24, 1972 letter, and of the May 23, 1972 memorandum, are annexed as Exhibit B.

5. In the early afternoon of Wednesday, May 24, the Phillips Affidavit in opposition to the instant motion was delivered to my office. None of the exhibits referred to therein was attached to the Phillips Affidavit.

6. Since the Phillips Affidavit is highly inflammatory and deals at great length with matters irrelevant to any issue raised by Alleghany Corporation's pending motion, the relief sought by Alleghany Corporation's motion should not be lost sight of. The following relief is sought:

(a) setting aside the $137,696.82 default judgment entered herein on May 12, 1972, on the ground that an _ex parte_ order was signed on May 10, 1972, and served and filed on May 11, 1972, which extended Alleghany Corporation's time to move or answer to June 2, 1972;

(b) ordering plaintiff to pay Alleghany Corporation's costs and attorneys' fees in moving to set aside the default judgment, on the ground that plaintiff had no possible justification for refusing on May 15, 1972 to vacate the default judgment, which he then knew had been improperly obtained;

(c) staying all further proceedings by plaintiff herein, until he either obtains an attorney to represent him or designates persons at his residence who will accept service of papers, on the ground that plaintiff had intentionally prevented service of papers upon him; and

(d) for other and further proper relief.

7. The Phillips Affidavit in the main is irrelevant to the matters before the Court. The following brief summary of its contents may be useful in disposing of this motion:

(a) Phillips, who appears herein pro se and is not a member of the bar, seeks to establish that he is "an attorney" and a "lawyer" (p.1).

(b) He describes his coronary attack on May 21, 1972, and background with respect thereto (pp.1-2).

(c) He argues that no "good reason" has been shown for setting aside the default judgment, and that the May 10, 1972 order extending Alleghany Corporation's time to move or answer was improvidently granted (pp.3-5).

(d) Phillips urges that his May 12, 1972 default judgment was obtained prior to physical entry on the Clerk's docket sheet of the May 10, 1972 order extending defandant's time, and that the default judgment, although not entered on the Clerk's docket until after entry of the May 10 extension order, somehow takes precedence and should remain in effect (pp.5-6).

(e) Phillips represents that he supposedly told me prior to the making of this motion by order to show cause that he was willing to voluntarily stay execution on his judgment, thereby making the order to show cause unnecessary (pp.6-7), and that I purportedly suppressed this knowledge and thereby committed "fraud on this Court" (p.7, underlining in original).

(f) He complains that the May 10, 1972 order extending Alleghany Corporation's time was obtained by "unscrupulous method, indeed almost fraudulent," because my affidavit in support of that order failed to state that Alleghany Corporation has been represented for many years by Donovan Leisure Newton & Irvine (pp.7-8), that I was obligated to disclose who in Alleghany Corporation had retained my firm rather than its traditional counsel (pp.13-14), and why my firm was not retained until the 19th day after Alleghany Corporation was served herein (Ibid.).

(g) Phillips discursively (pp.7-13) recites his dealings in 1939-1959 with a variety of important persons and purported problems of the Donovan firm, and in the process accuses one of the partners of Donovan Leisure Newton & Irvine of having committed "fraud on his own senior partner [and] has UNJUSTLY ENRICHED (caps unintential) [sic] himself" (p.13).

(h) Finally, Phillips asks that Alleghany Corporation's motion be denied, that he receive "attorney's fees and costs" because of my "PROFESSIONAL MISCONDUCT AND . . . THE FAILURE TO DISCLOSE THE NAME OF THE PERSON RETAINING . . . [my] FIRM AND THE REASON FOR SAID DELAY UNTIL SAID NINETEENTH DAY," and asks that I "BE CENSURED BY THIS COURT" for my conduct.

8. It is apparent that the Phillips Affidavit contains nothing which conceivably can dissuade the Court from setting aside the default judgment, which never should have been entered in the first place. Whether obtained by accident or design, the default should be vacated forthwith.

9. As to appropriate additional relief, I respectfully urge that the Court should come to grips now with the serious problems raised by Phillips' conduct so that the future course of this litigation may contain some semblance of order and dignity. These problems are:

(a) Phillips has refused to accept service by hand of papers in the litigation, thereby creating unnecessary problems for defendant and potentially making the Court's orders for personal service of papers impossible to fulfill. (See ¶6 of my moving affidavit and the accompanying reply affidavit of Walter Fiorentino.)

(b) Phillips seeks to hold himself out as a lawyer (Phillips Affidavit p.1), and indeed sues for "attorney's fees" in this action. (See, e.g., Complaint ¶¶10-11), but he does not abide by the ethical canons governing attorneys' conduct and is not subject to the potential sanction of disbarment.

(c) Phillips has made unfounded and cavalier attacks upon members of the bar of this Court, and there is every indication that, absent appropriate measures by the Court, he will continue to do so.

10. Many of the problems raised by Phillips' conduct potentially can be solved if he is not permitted to proceed without counsel. In addition to solving the problem of service of papers, this presumably would cause plaintiff's case, if any he has, to be prosecuted responsibly. Moreover, in view of Phillips' alleged physical condition, I should not be placed in a position where Phillips may contend that I have taken advantage of or caused a worsening of his poor health. Alternatively, although less satisfactory, it is urged that all proceedings should be stayed until Phillips' doctor certifies to the Court that Phillips' physical condition permits him to conduct this litigation without risk.

11. Rule 4(b) of the General Rules of this Court provides that service of papers on a party appearing _pro se_ may be made "in like manner as service may be made upon an attorney," or, upon designation, "upon the clerk of the court in which the action is brought as the person upon whom service may be made". A potential solution to the problems created by Phillips' refusal to accept service of papers is to compel him to designate the Clerk of this Court as a person upon whom papers for Phillips may be served.

12. Phillips' latest charges of fraud and misconduct by members of the bar of this Court are not new. In an unreported _per curiam_ opinion by the Second Circuit Court of Appeals on June 21, 1963, in _Ackert_ v. _Ausman_, the Circuit

Court stated that (Kaufman, J.):

> "He [Phillips] hurls thoroughly unsubstantiated charges at reputable counsel . . . . What does concern me is his cavalier and outrageous use of the federal courts--and indeed other forums--for his unrestrained attacks upon the personal veracity and professional competence of counsel . . . . He comes before this Court wearing the cloak of a pro se applicant, and seeks to extract from us the solicitude ordinarily afforded one appearing without counsel. But this should not shield him from rebuke when merited. He is an intelligent, able and sophisticated litigant, who is no stranger to this Court, having appeared frequently in his own behalf both in the District Court and the Court of Appeals. We would expect that one possessed of his background would be conscious of the outer limits of forceful advocacy and fully aware when his acts transgress these limits . . . . "

The full text of Judge Kaufman's opinion, with which the two other Circuit Judges stated they "agree in substance," is Exhibit C hereto.

13. The Phillips Affidavit charges John E. Tobin, Esq., a distinguished senior partner of Donovan Leisure Newton & Irvine, with "fraud," and goes out of its way to do so by dragging in supposed events that have no possible relation to any issue raised by the motion at bar. Phillips also has charged me with "fraud on this Court" and "professional misconduct," on patently flimsy grounds. These personal attacks can be ended only through forceful action by the Court. It is urged that the Phillips Affidavit should be stricken as immaterial, impertinent and scandalous, with a direction to the Clerk that it be physically removed from the record. In addition, since Phillips affirmatively asserts on this motion that he is "an attorney" and a "lawyer," it is urged that his conduct should be referred to the Chief Judge for appropriate action, pursuant to Rule 5

of the General Rules of this Court, and that costs and attorneys' fees on this motion should be awarded to defendant Alleghany Corporation in connection with the Court's disposition of the instant motion, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, "upon such terms as are just".

Richard L. Bond
Richard L. Bond

Sworn to before me this
25th day of May, 1972

Beverly Sue Collier
Notary Public

BEVERLY SUE COLLIER
NOTARY PUBLIC, State of New York
No. 31-[illegible]7890
Qualified in New York County
Commission Expires March 30, 1973

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

RANDOLPH PHILLIPS, : 72 Civ. 1544

Plaintiff, :

-against- : **AFFIDAVIT**

INVESTORS DIVERSIFIED SERVICES, INC., :
and ALLEGHANY CORPORATION,
:
Defendants.
:

- X

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

WALTER FIORENTINO, being duly sworn deposes and says:

1. I am a messenger employed by Capital Messenger Service, 35 West 43rd Street, New York, New York.

2. In the afternoon of May 18, 1972, in the course of my employment, I picked up at Marshall, Bratter, Greene, Allison & Tucker, an envelope addressed to Mr. Randolph Phillips, 30 East 72nd Street, New York, New York.

3. At approximately 3:30 P.M. on May 18, 1972, I arrived at 30 East 72nd Street and knocked on the entrance door to the building. An individual who appeared to be the doorman, opened the door and asked me what I wanted. I told him that I had an envelope for Mr. Phillips.

4. The doorman asked me to write the name of the sender of the envelope upon a slip of paper which I proceeded

to do. The doorman instructed me to sit on a bench in the lobby while he went upstairs to check to see if Mr. Phillips was home. The envelope remained in my possession during the doorman's excursion upstairs.

5. Upon the doorman's return to the lobby, he told me that he was not authorized to accept any packages on behalf of Mr. Phillips and that Mr. Phillips was not at home.

6. I left the building and called my office. I was instructed by my office, Capital Messenger Service, to return to 30 East 72nd Street and attempt to slip the envelope under the entrance door of the apartment house. I returned to the building and was able to slip the envelope from Marshall, Bratter, Greene, Allison & Tucker addressed to Mr. Randolph Phillips, under the entrance door to the lobby at 30 East 72nd Street. I left the premises and again called my office, at which time I was instructed to proceed to Marshall, Bratter, Greene, Allison & Tucker, 430 Park Avenue, New York, New York, to prepare an affidavit setting forth the events that had just occurred.

Walter Fiorentino

WALTER FIORENTINO

Sworn to before me this
23 day of May, 1972.

Daniel Tannenbaum

NOTARY PUBLIC

DANIEL TANNENBAUM
Notary Public, State of New York
No. 24-3930200 Qual. in Kings County
Certificate filed in New York County
Commission expires March 30, 1973

FILED IN COURT
MAY 25 1972

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RANDOLPH PHILLIPS,

Plaintiff,

-v-

INVESTORS DIVERSIFIED SERVICES, INC. and ALLEGHANY CORPORATION,

Defendants.

---

72 Civil 1544

PLAINTIFF'S AFFIDAVIT IN OPPOSITION TO THE ORDER TO SHOW CAUSE & TO THE RELIEF SHOUGHT BY DEFENDANT ALLEGHANY THEREIN & FOR DIFFERENT & OTHER RELIEF SOUGHT BY PLAINTIFF AGAINST DEFENDANT ALLEGHANY CORPORATION

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

RANDOLPH PHILLIPS, being duly affirmed, hereby deposes and says: I am the plaintiff herein, appearing as attorney pro se, and as such I am an attorney within the meaning New York Civil Practice Act , 104. I also am a lawyer within the definition thereof BLACK'S LAW DICTIONARY, (1968,ed). Some of these and subsequent citations may be incorrect, as well as this typing, because I am recovering from a "severe attack of coronary insufficiency" suffered by me on the way to Cambridge, Mass. on May 21,1972. (See Exhibit A, appended herein). I was apprehensive a week ago last Sunday (May 14,1972) that I might be aggravating a condition of angina pectoris that I have been suffering for four years because ofthe public and private responsibilities I have been accumulating and the affidavit, paragraph 1) was not obtained "for cause shown" within the meaning of RULE 6(b) ENLARGEMENT, F.R.C.P., AND if Judge Lasker read in its entirety and carefully the moving affidavit of Mr.Bond in support thereof, he unwittingly, I believe "abused his discretion" in granting said relief on the basis of said affidavit of Mr.Bond sworn to May 10,1972. However as a matter of law I do not believe it will be necessary for this Court to reach that point unless I follow this affidavit with a motion to vacate the May 10th,1972 ex parte order of Judge Lasker. I believe that the decision on the pending motion Motion now before this Court will obviate the necessity of plaintiff so moving but if I am wrong I respectfully request an opportunity so to move, before this Court enters any order herein.

2. The May 10th affidavit pursuant to which Mr. Bond successfully obtained the May 10 order was neither received by me nor entered on the docket sheet of the Clerk of the District Court until after May 11,1972. The default judgment in question was submitted by myself to the Judgment Clerk and by him to John Livingston, the Clerk of the Court, in my presence on May 11,1972 and neither that day nor the next day, May 12,1972, as I personally verified, as did John Livingston, the Clerk of the Court, in my presence was there any entry on the docket sheet of Judge Lasker's order or any notice of motion made to procure such relief as would prevent entry of a default judgment. If there were Clerk Livingston's Certificate would patently be

a falsehood. This Court, I am confident, know Clerk Livingston too well to believe he would engage in such a tactic. Nor as I personally verified both on May 11 & 12th,1972 was there any entry on the Calendar sheets of the order of Judge Lasker of May 10th referred to by Mr. Bond, of the motion clerk. I did soo verify before Clerk Livingston signed the Certificate of Default. Nor did Judge Lasker's law clerk Nicholas _________ (whose last name I have forgotten) notify me that, although Judge Lasker was sitting in the motion part, the Bond application for an extension of time- of which I then knew nothing - had been signed, although I went to him because the Judgment Clerk insisted my application was a Rule 54 motion under the federal rules, which must be granted by a judge, because there were 2 defendants, even though the second one had never been served and thus was not like Alleghany a real defendant. Judge Lasker's clerk made a very simple suggestion, which I adopted, namely strike out in ink on the application for a default judgment and appended papers, the name of the second defendant, Investors Diversified Services, Inc. This I did, as the attachments to Mr.Bond's papers disclose. I submit that in these circumstances Judge Lasker's order is null and void, due to the lack of expedition of Mr.Bond's office in filing it timely and before Clerk Livingston signed his certificate, noting default and my judgment was entered. I contend that from defendant Alleghany's point of view Judge Lasker's order of May 10th is without legal force or effect when Clerk Livingston in the above circumstances signed the Certificate Noting Default and

and when the default was entered that day by the Judgment Clerk, meaning the day of May 12th,1972. Although I am now aware that the Docket sheet in the Clerk's office reflects entry of Judge Lasker's order on May 11,1972, I know of my own knowledge that it was not since I saw the assistant clerk making the docket sheet entry of it on May 15,1972.This I did when I went to her to see if my own default judgment submitted to the Judgment Clerk on May 11,1972 had been entered. She told me she was just then entering it and I saw that the entry was under that for Judge Lasker's May 10th order, which she told me she had just made. I submit it was error on her part to place Judge Lasker's order ahead of mine, because mine had been filed by the Judgment Clerk, after being assigned a number on May 12,1972, and the May 10,1972 order obtained by Mr.Bond had not even arrived in the docket clerk's room until days later, due to the failure of Mr.Bond's firm, to see to it that such an order as Judge Lasker's was filed and docketed forthwith, as would have happened if the facts stated in his affidavit are true and his office aware of the needs for preventing entry of the default judgment to which I am lawfully entitled. If this Court disagrees with me, I submit Mr.Bond has ample procedure to make an application for relief under Rule 6(b)(2). F.R.C.P. He should not be allowed to circumvent that procedure by mailing to me on May 11,1972 - after the default of his client - the order signed by Judge Lasker on May 10,1972. Certainly, as a matter of fairness, not to mention law, his May 10th order, did not become effective until served upon me and he did not do this until he mailed it to me in an envelope postmarked May 11,1972 and received at my legal address on May 12,1972, and thus said order was not of any legal force or effect, since my default application had been submitted to the Clerk of the Court on May 11,1972. I respectfully submit that it is the Clerk's Certificate Noting Default and the number judgment assigned thereto that converts a default judgment into a valid one which the Marshal can execute and that the date of entry of Judge Lasker's ex parte order on the docket sheet on May 15,1972 (although carrying the identification of May 11,1972) does not arrest execution of the judgment since it was not served upon me until by envelope dated May 11, 1972, received May 12,1972, and thus of no legal force to cure the default of May 10,1972. Even so and most important, I made no attempt to execute the judgment by giving it to the Marshal or otherwise and when Mr. Bond the next morning (May 13,1972) called me in a bellicose tone of voice to demand I stipulate to its vacatur, I told him I would take no step to execute it, and I also so told his senior partner Raphael Scobey,(who had represented me before this Court in a case on behalf of The Committee for Fair Play for Voters, of which I am Chairman, against Nelson D. Rockefeller, or some similar political case.) (cite to be supplied) The important fact here is that Mr.Bond, by suppressing his knowledge that I had twice offered on May 13,1972 to take no step to execute my default judgment until he had an opportunity to move against it and obtain a vacatur, if justified, under the Rules, obtained from this Court an unnecessary order, depriving me, an ill man

COMPLETE
ORIGINAL
IN Record IN Docket
NO. 74-2188

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
--------------------------------------x

RANDOLPH PHILLIPS, :

Plaintiff, : 72 Civ. 1544

-against- :

INVESTORS DIVERSIFIED SERVICES, :
INC. and ALLEGHANY CORPORATION,

Defendants. :

NOTICE OF APPEAL

--------------------------------------x

Notice is duly given that Alleghany Corporation, a defendant herein, hereby appeals to the United States Court of Appeals for the Second Circuit from the Judgment By Default entered against Alleghany Corporation in this action on the 12th day of May, 1972.

Dated: New York, New York
June 8, 1972

MARSHALL, BRATTER, GREENE,
ALLISON & TUCKER

By____________________

Attorneys for Defendant
Alleghany Corporation
Office & P. O. Address
430 Park Avenue
New York, New York 10022

TO: Clerk, United States District Court
Southern District of New York
Foley Square
New York 7, New York

Mr. Randolph Phillips, pro se
30 East 72nd Street
New York, New York 10021

CLERK
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
U. S. COURT HOUSE - FOLEY SQUARE
NEW YORK, N. Y. 10007

OFFICIAL BUSINESS
PENALTY FOR PRIVATE USE $300

POSTAGE AND
UNITED STATI

Mr. Randolph Phillips
30 East 72nd St.
New York, New York 10021

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

RANDOLPH PHILLIPS,

Plaintiff,

-against-

ALLEGHANY CORPORATION and
INVESTORS DIVERSIFIED SERVICES, INC.,

Defendants.

- x

72 Civ. 1544

MEMORANDUM

FRANKEL, D.J.

Plaintiff, a busy _pro se_ litigant, brought this action to recover $94,950.00 plus interest from October 1964. Service was made upon defendant Alleghany Corporation on April 20, 1972. For reasons that may or may not be compelling, but for no reason substantially hurtful to plaintiff, Alleghany did not retain its defense lawyers until May 9, 1972. With the time to answer about to expire, defense counsel sought diligently to reach plaintiff. Because plaintiff's _pro se_ facilities fall short of those in law offices for this and other purposes, it was not possible either to reach him or otherwise effect

BEST COPY AVAILABLE

arrangements for an extension. (The papers make this clear enough. Oral argument left no doubt about the difficulty of reaching or serving plaintiff.) In these circumstances, duly sworn and recited, counsel obtained from Judge Lasker, on May 10, an ex parte order extending to June 2, 1972, Allegheny's time to move or answer. Judge Lasker provided that service of this order would be sufficient if made on or before May 15, 1972. Attempting prompt personal service on May 11, but finding neither plaintiff nor any agent of his physically accessible, counsel served Judge Lasker's order by mail on that day.

As sometimes happens, that order was not filed instantly, with proof of service, in the office of our Clerk. But plaintiff was punctual, breathtakingly and to a fault. On May 11, 1972, he made an affidavit for a default judgment. On the next day he obtained a default judgment for a total of $137,696.82.

Alleghany's counsel learned of this on the afternoon of May 12, and immediately launched another series of efforts to reach plaintiff and remedy the absurdity. When he finally succeeded on May 15, it was not possible to effect an agreement for vacatur. The motion now before the court, to vacate the default and for other relief, was brought on by order to show cause signed May 15, 1972.

The ensuing proceedings, for what should have been routine correction of a situation that should never have existed in the first place, have been prolonged and exasperating beyond any due measure. And the main causes of the unpleasantnesses have been the tenacious bellicosity and abusiveness of the plaintiff. Referring repeatedly to his medical problems - describing himself, with unquestioned accuracy, as "an ill man of 61 1/2 years of age" - plaintiff has not stinted in heaping insult upon opposing counsel; he has filed voluminous and gratuitous attacks upon various state and federal judges; he has festooned his papers with baseless and essentially irrelevant charges of fraud, including "fraud upon this court," malice, "hidden motives," and, to end with one of his gentler notes, the "obvious ignorance" of counsel for defendant. He has urged, preposterously, that counsel for defendant be "fined" and "censured."

There is a familiar class of pro se litigants from whom such behavior would be taken with serene and sympathetic understanding. But the present plaintiff is not such a one. He is, as a Judge of our Court of Appeals observed a while ago, "an intelligent, able and sophisticated litigant, who is no stranger to this Court, having appeared frequently in his own behalf both in the District Court and the Court of Appeals." From Mr. Phillips, then, the course of invective and relentless imposition upon counsel and the court is both more grievous in its impact and less excusable than it might be from people lacking his competence. Whatever visions "pro se" commonly inspires, we deal here with a citizen who can hold his own with the members of our bar. He should be held to standards of decency and propriety at least approximating those applicable to others.

Three things emerge from the unpleasantness:

(1) The default should never have been entered, but it should certainly have been vacated. voluntarily after plaintiff learned on May 12 of Judge Lasker's order.

(2) The main cause of this sorrowful comedy is plaintiff's inaccessibility for service and consultation. An informal direction to correct this was made at oral argument and will be embodied in the order announced today.

(3) Even if plaintiff was right to resist vacatur, his tendentious

> mode of combat has imposed upon
> his adversary physical, emotional
> and technical legal burdens far
> beyond the reasonable necessities
> of the case.

For keenly understandable reasons, the movant seeks the exaction from plaintiff of costs and attorneys' fees. In this respect, however, the court will act only after further submissions. Counsel for the movant will serve and file, on or before July 3, 1972, an affidavit or affidavits detailing the claim for costs and attorneys' fees. At the same time a supporting memorandum of law should state and specifically document the legal ground or grounds for this claim. Plaintiff will have until July 17, 1972, for answering papers. The court will thereafter determine whether costs and attorneys' fees should be awarded, and, if so, the amount thereof.

At this time, the following rulings are made:

(1) The motion to vacate the default is granted.

(2) The movant's time to answer the complaint or make appropriate motions with respect to it is extended to June 27, 1972.

(3) In accordance with the understanding reached at oral argument, service of papers in this case upon the plaintiff, where service more prompt than the mails is desired, may be made by leaving copies on the table in the lobby of plaintiff's apartment building at 30 East 72d Street, New York City, with plaintiff to make provision that entry into the lobby shall be feasible for such service during at least the hours from 9:00 a. m. to 6:00 p.m.

It is so ordered.

Dated: New York, New York
June 15, 1972

MARVIN E. FRANKEL

U.S.D.J.

FILED

2/10/74

38629

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

RANDOLPH PHILLIPS,

Plaintiff,

-against-

ALLEGHANY CORPORATION and
INVESTORS DIVERSIFIED
SERVICES, INC.,

Defendants.

- x

72 Civ. 1544

MEMORANDUM

FRANKEL, D.J.

Having joined the roster of judges and others charged with fraud by this plaintiff, I have duly considered the assertion that I should heretofore have recused myself from this case or should do so now. I conclude that the performance of my duties required, and continue to require, handling of this matter in the normal course of the court's business.

Defendant's papers sufficiently refute, I think, the atrocious conclusions plaintiff would draw from my involvement 15 years or so ago as an associate in the law firm of which I later became a member.

If facts like these could be disqualifying - or could be deemed by any rational person to create appearances of impropriety - the judges of this court would spend much of their time reviewing their work lives and handing over to each other such routine chores as the motion in the instant case.*

The motion for reargument is denied. It is so ordered.

Dated: New York, New York
July 3, 1972

U.S.D.J.

---

* It is of passing, if incidental, interest to note that plaintiff's research efforts into my biography were not triggered in the course of *Valenti* v. *Rockefeller*, 292 F. Supp. 851 (1968), affirmed, 393 U.S. 405 (1969), where my (erroneous) judgment was that his side should prevail.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RANDOLPH PHILLIPS,

Plaintiff,

-against-

ALLEGHANY CORPORATION and INVESTORS DIVERSIFIED SERVICES, INC.,

Defendants.

---

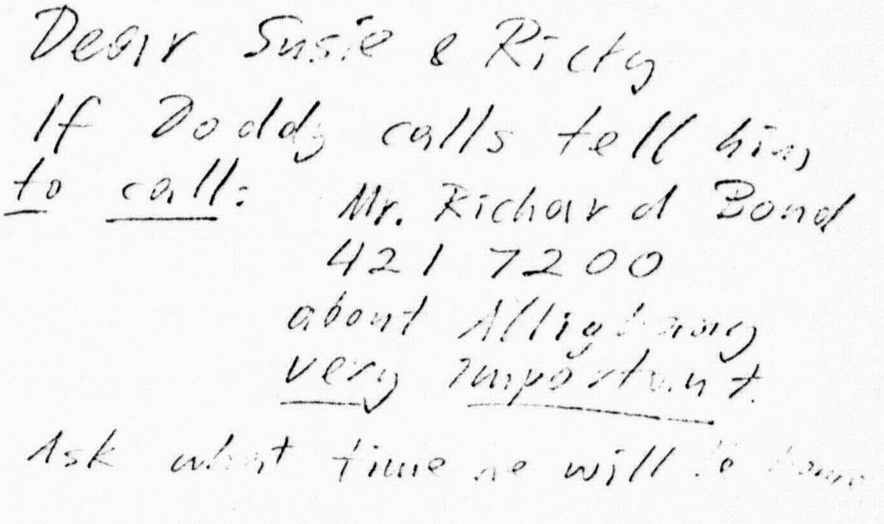
72 Civil 1544

AFFIDAVIT OF Plaintiff RANDOLPH PHILLIPS IN ANSWER TO AFFIDAVIT OF RICHARD L. BOND, ESQ. SWORN TO MAY 10,1972; TO AFFIDavit of Richard L.BOND, ESQ., SWORN TO MAY 25,1972; AND TO SO-CALLED "REPLY AFFIDAVIT" OF RICHARD L. BOND, ESQ., SWORN TO JUNE 5,1972; AND IN SUPPORT OF PLAINTIFF'S REQUEST THAT THIS COURT DISSOLVE AND VACATE FORTHWITH ITS ORDERS HEREIN DATED MAY 10,1972 AND MAY 15,1972.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

RANDOLPH PHILLIPS, being duly affirmed, hereby deposes and and states: I am the Plaintiff herein, acting as attorney pro se, and I make this affidavit in answer to the aforesaid affidavits of Richard L. Bond, Esq. and in support of plaintiff's request that this Court dissolve and vacate forthwith its orders herein dated May 10,1972 and May 15,1972, and for other relief as set forth in Plaintiff's accompanying MEMORANDUM OF LAW in opposition to Defendant AlleghanyCorporation's motion "pursuant to Rules 55(c) and 60(b) of the Federal Rules of Civil Procedure.".

1. As to the "female" referred to in the Bond affidavit sworn to May 15,1972, par. 4, p.2, this was my wife Lily R. Phillips who wrote to my 17-year-Old daughter Susie and my 11-year old "law partner" Ricky the following note on May 10,1972:



Dear Susie & Ricky
If Daddy calls tell him
to call: Mr. Richard Bond
421 7200
about Allighany
very important.
Ask what time he will be home

2. I at no time that day of May 10,1972 did call my wife Lily nor my daughter Susie nor my son Ricky nor anybody else at my home in New York City until shortly prior to, I believe, around 7 P.M. that evening, to advise that they should expect me home from Washington, D.C., where I then was, on or around 11:30 P.M. that evening.

3. On arriving at my home at 30 East 72nd Street, New York, that evening my wife showed me the above handwritten note reproduced in paragraph 1 above. "Who is Richard Bond?" I asked her. She did not know. It later struck me that the telephone number was that of Marshall, Bratter, Green, Allison & Tucker, a law firm which had represented me in civil rights litigation in this Court and several of whose partners I knew, including Raphael Scobey and Harry Weinstein, two honorable and able members of the Bar of this Court. I had previously discussed with Mr. Weinstein a matter affecting an affiliated company of Alleghany Corporation but I do not waive my attorney-client privilege and therefor will not disclose this matter to this Court.

4. Thereafter late as it was and tired as I was upon arriving home on the late evening of May 10,1972, I nevertheless looked at the Manhattan telephone directory and found listed therein a Richard Bond with the aforesaid telephone number. The directory did not describe him as an attorney nor did it list a residential telephone for him.

Plaintiff was engaged on May 10,1972 in a matter that many persons consider important in the national interest and which should be no secret now by reason of the fact that it was the subject of a 2-page ad in THE NEW YORK TIMES of May 31,1972 , pp. 22-23, and carried plaintiff's name as Chairman of the Executive Committee to enforce the program therein set forth. Also see New York Times, June 1,1972, p. 27; June 3,1972, p. 33 NIXON SENDS PRESSMEN AT TIMES HIS THANKS FOR PROTEST OVER AD; also see New York Times, Sunday, June 4,1972, Section 4, Review of the Week, page 6 under heading LAW; and New York Times, Letters to the Editor, June 8,1972, On the House Resolution to Impeach Nixon, by Telford Taylor.

Finally, it should be noted, that Mr. Bond's process server of "the managing clerk's office of my firm" who allegedly tried to serve plaintiff Judge Lasker's Ex Parte order, "at 10:30 A. M., on May 11, 1972," (Bond affidavit in support of order to show cause, paragraph 6, p. 3) does not allege that he was denied admittance by the doorman to the building at 30 East 72nd Street, New York, N. Y. (Plaintiff's address of record, see Complaint, signature). In fact his statement by Bond's affidavit admits he was within the building. His failure to leave said Ex Parte order "in a conspicuous place therein", as permitted by Rule 5 (b), or "with some person of suitable age or discretion then residing therein" (as has every adversary attorney with whom plaintiff has dealt with in the past 23 years) is certainly not plaintiff's fault. In any event the point is moot since defendant made no attempt at service until after the default.

In addition the docket sheet of this Court fails to disclose that attorney Bond even appeared in this Court by filing any paper on May 10, the last day of the 20 day period, or on May 11, 1972, when the default judgment was submitted to the Clerk. Plaintiff's affidavit FILED IN COURT May 25,1972, at pp. 5-8.

I trust these facts will persuade the Court, that I was not engaged in "ducking" service or avoiding Mr. Bond's telephone call on May 10,1972.

5. Blackner v. Sun Oil Co., 2 FR Serv. 6b.32, Case 1, (DC N.J.) ruled that an ex parte order extending time "to respond" to the Complaint" should be construed to permit defendant only to answer within the extended time. Defendant Alleghany Corporation failed by any of its officers to "state with particularity the grounds therefor" (here the Ex Parte order) as prescribed in Rule 7(b)(1), F. R. C. P. See 2 Moore's Federal Practice, par. 5.10 with respect to Rule 5(d) with respect to the fact that service of the Ex Parte order was not made upon plaintiff herein until it was enclosed in an envelope dated May 11, 1972 or rather so postmarked by the Post Office, or 1-day after the 20 day period for answering the complaint had expired. Plaintiff's affidavit FILED IN COURT, May 25, 1972, last 6 lines, at p. 7. Also see Moore's statement that federal rather state rules control the question of propriety of service, citing Mid-Continent Casualty Co. v. Everett (CA 10th, 1965), 340 F.2d 66.

And that a written motion which is heard ex parte should be filed timely. (See plaintiff's affidavit FILED IN COURT, May 25, 1972, last 7 lines, p. 6)

I submit that these facts, rules, and citations acquit me of the spurious charges of attorney Bond that I in some way am sort of an unscrupulous avoider of court process and a "sharpie" in seeking to enter a default judgment with improper speed so as to deprive his client of his or its rights.

6. Appended hereafter are the following exhibits, of which this Court may take judicial notice, but which I verify on personal knowledge as true (except for the secret ex parte visit by John E. Tobin, Esq. to Henry J. Friendly, C.J. referred to in Exhibit A at page 16) and which I believe on information and belief to be true, said visit referring to the case of Morris Smith et al. v. Robert J. Fitzsimmons et al., 394 F.2d 381 (2 Cir. 1968) and in which Robert L. Bobrick, Esq. was attorney for the plaintiffs and with whom I was associated as his Consultant, and which also refers to a Rule 19 motion in the in the same Court of Appeals which I argued as attorney pro se. At no time prior to the oral argument therein or thereafter did either Judge Friendly or attorney John E. Tobin, who appeared and argued in open Court for defendant Allan P. Kirby disclose either to

to Mr.Bobrick or myself the fact that such a secret ex parte visit had been made to Judge Friendly, nor did Judge Smith nor District Judge Gignoux, the other members of the Court's3-judge panel to whom Judge Friendly allegedly disclosed the secret ex parte visit (Exhibit A at p.16, first column) disclose said visit either to Mr. Bobrick or myself, who were attorney Tobin's adversaries in said case, nor did any of the said 3 judges disclose either to Mr.Bobrick or myself the "memorandum on disqualification" dated Februray 19,1968 referred to in said Exhibit A, page 16, second column. To my own knowledge, the facts which that memorandum set forth, as described by Judge Gignoux in said second column were untrue and omitted material facts known to Judge Friendly, and by reason of said untruths and omissions Judge Gignoux was misled into giving the quoted advice by him "that he had told Judge Friendly that he was obligated to sit on the case" citing therefor in support thereof "an opinion of Chief Judge Aldrich of my circuit" based on facts entirely dissimilar to those in the cases which are the subject matter of said Exhibit A.

While I realize that it is embarrassing to require a Judge of this District Court, namely the Honorable Marvin E. Frankel, to take notice of and make findings with respect to these facts, which relate to the Chief Judge of his own Circuit, I respectfully suggest that it is much more embarrassing to the good name and reputation of all other sitting district court and appellate judges in the Second Circuit not to take such notice and to take such steps so as to maintain the good name and reputation of the Second Circuit judiciary and disassociate the members thereof from such practices as secret ex parte visits to a judge about to hear oral argument on the merits of one of the most important cases, judged both by the amount of dollars involved and by the ethics of defendant Fitzsimmons sitting as a special master of this Court and a Referee of the State Court and who himself made secret ex parte visits to the late Charles T. Ireland, Jr. and to New York State Supreme Court Justice Owen J. McGivern, who failed to disclose them to Seymour Graubard, Esq., attorney for objecting stockholder Rosen in the subject matter case at issue (Zenn v. Anzalone cited in Smith v. Fitzsimmons) and who also failed to disclose on the record to the attorneys therein and thus to the Appellate Division, First Judicial Department, that he was a former associate of Donovan Leisure Newton & Irvine and thereafter a partner of a law firm that represented Investors Diversified Services, Inc., the chief subsidiary of Alleghany Corporation, both of which were under the control of the late Robert R. Young and of Allan P. Kirby, whose settlement of the claims against them for $1,000,000 cash was approved by Referee Fitzsimmons and Judge McGivern and disapproved by a Judge of this District Court, Lawrence E. Walsh, D.J., and by Judge Edward J. Dimock of this District Court upon objection of Seymour Graubard, Esq. and the late George Brussel, Jr., as attorneys for objecting minority shareholders, a disapproval which resulted ultimately in a $3,000,000 cash settlement for the benefit of defendant Alleghany Corporation and an order directing defendants Clint W. Murchison, Jr. and John D. Murchison, d/b/a Murchison Brothers to return to Alleghany Corporation the controlling stock of Investors Diversified Services, Inc. This settlement compared with a $700,000 cash settlement arranged by attorney Abraham L. Pomerantz with the defendants Kirby, Young & Murchisons, by their attorneys Lord, Day & Lord per Thomas F. Daly, Esq., a member thereof, and Satterlee, Warfield & Stephens per Francis W.H. Adams, a member thereof, after attorney Pomerantz had copied the causes of action in Breswick & Co. v. Briggs (cited in Smith v. Fitzsimmons) and then made merely a $700,000 cash settlement of the claims therein andin Zenn.

This long recital is necessary in order that this Court may understand the true and hidden motives of John E. Tobin, Esq. of the Donovan Leisure Newton & Irvine law firm and of his client Alleghany Corporation under the control of Fred M. Kirby and Allan P. Kirby, Jr., as Guardians of the Property of Allan P. Kirby in opposing the payment to plaintiff which is the subject of the prayer for judgment in the Complaint herein and which is now the dollar amount plus accumulated interest which is the subject of the Default Judgment obtained herein by plaintiff. These facts also show there is no meritorious defense to the claims of plaintiff herein.

The appended documents in question which establish these facts are:

EXHIBIT A - the May 1970 issue of Scanlon's Magazine at pp. 9-16, which prints the suppressed New York Times 5-column galley proof news story relating to the judicial ethics of Henry J. Friendly, C.J.

EXHIBIT B - A letter by plaintiff (photo-copy of carbon copy) to James Reston, Executive Editor of The New York Times, dated August 19, 1969, which explains the reason for the suppression by The New York Times of said 5-column news story.

EXHIBIT C - The Annual Report of Alleghany Corporation for the year 1971, cover page, also page 3 thereof, and the page which should be numbered page 25 of said Report.

EXHIBITS D, E, F, G & H, being the proxy statements of Alleghany Corporation for the annual meeting of shareholders to be held in the years 1968, 1969, 1970, 1971 and 1972 and show at the appended pages thereof some $3,961,090 in legal fees for "Legal services" received by the "law firm of Donovan Leisure Newton & Irvine of which John E.Tobin is a partner" and which Robert M. Loeffler is a partner while also holding the position of of Senior Vice-President, Law of Investors Diversified Services,Inc.

EXHIBIT I - Letter by Roy W.McDonald on the stationery headed LAW OFFICES OF DONOVAN LEISURE NEWTON & IRVINE, to Mr. Randolph Phillips, dated October 5,1960 referring to the *Murchison* and *Freeman* actions (see Complaint in this civil action 72- 72-1544 in which this affidavit is being made at paragraph 2) in which the late Roy W.McDonald, Esq., an outstanding member of the Bar of this Court as will be attested by the Honorable Arnold Bauman, now a District Judge of this Court before whom Mr.McDonald and myself appeared when he was sitting as Special Master for 3-years in said *Murchison* case (218 F.Supp.164) by appointment of the Honorable Lloyd McMahon, D.J. In said letter Mr.McDonald stated to Randolph Phillips, plaintiff herein, "Our firm will appear for Messrs. Allan P. Kirby and Fred M. Kirby. *I equate your pro se appearances to the appearances by counsel*." (Emphasis supplied)

EXHIBIT J - Letter by Randolph Phillips to Alleghany Corporation marked "Attention: John E.Tobin, Esq." and to Investors Diversified Services, Inc. marked "Attention: Robert M. Loeffler, Esq." and dated June 16,1970, requesting payment of $94,950.00 plus 6% interest compounded annually from October 13,1964 to date.

EXHIBIT K - Letter to Carl E. Newton,Esq. from Randolph Phillips dated July 13,1970.

EXHIBIT L - Letter from John E. Tobin to Mr. Randolph Phillips, dated November 30, 1970 in which attorney Tobin states :

> "I am writing on behalf of Alleghany Corporation and Investors Diversified Services, Inc., and at the request of Mr. F.M. Kirby, Chairman of the board of both companies.
>
> Please be advised that neither company recognizes the claim for compensation which was embodied in your letter of some months ago to both companies."

Very truly yours,

(Signed) John E. Tobin

EXHIBIT M - Article in THE NEW YORK TIMES, THURSDAY, December 5, 1963, headed ALLEGHANY CORPORATION IS REGAINED by Kirby Group. at page 69, including excerpt therefrom at page 70 quoting Allan P. Kirby (Senior) as stating: "I have a high regard for Mr. (Randolph) Phillips and what he did while a member of the I.D.S. board."

7. This Court will note that one of the alleged reasons for the sham "fraud" suit by the Murchisons and by Alleghany Corporation as successor plaintiff was what plaintiff Randolph Phillips herein "did while a member of the I.D.S. board." See SECOND COUNT of original complaint in 60 Civil 3511 in this Court, amended complaint dismissed after trial on the merits as to all defendants, including Randolph Phillips (218 F.Supp. 164) but appeal taken from judgment therein as to all defendants except Randolph Phillips. *Alleghany Corporation* v. *Kirby*, 333 F.2d 327

8. *Nothing in this affidavit nor the documents appended thereto nor in the prior affidavit of plaintiff nor in his Memorandum of Law is a criticism or to be construed as a reflection on the ethical conduct of any member of the Law Firm of Donovan*

Leisure Newton & Irvine, except Messrs. John E.Tobin, Esq. and Robert M. Loeffler, Esq., the two secret ex parte visitors to the chambers of Henry J. Friendly, C.J. and Owen J. McGivern, J., the first said attorney making said visit prior to argument of Smith v. Fitzsimmons and the latter to the chambers of Mr.Justice McGivern in the matter of Zenn v. Anzalone so as to arrange for Alleghany Corporation under the control of Allan P. Kirby to pay a "fee" for said Fitzsimmons' alleged "services" as Referee and Special Master in Zenn and Breswick in which he whitewashed both the original $700,000 Pomerantz settlement and the $15,000,000 I.D.S. stock transaction (presently worth at least $90,000,000 to "the Kirby family" and the Estate of Robert R.Young, Anita O'Keefe Young, Executrix), said "fee" for said "services" by said Fitzsimmons being agreed to by attorney Loeffler on behalf of Alleghany Corporation under the control of Allan P. Kirby, Sr. in the sum of $125,000. No disclosure being made of said Loeffler and Fitzsimmons secret ex parte visits in the record of Zenn nor of Breswick & Co. so that they might be known to the Appellate Division, 1st Dept. of the Supreme Court of the State of New York nor to the United States Court of Appeals for the Second Circuit nor to Judge Edward J. Dimock, D.J. of this Court before whom Breswick & Co. v. Briggs came for final disposition.

9. Although plaintiff Randolph Phillips had hearsay information with respect to said secret ex parte visits, he was advised by his attorney-employer Seymour Graubard,Esq. it was insufficient to constitute admissible evidence in this or the State Supreme Court. It was only after the stringent comments of Moore, C.J. and the stinging dissent of Friendly, C.J. in Alleghany Corp. v. Kirby re the 1950 I.D.S. transaction by Kirby and Young, that

Bobrick and plaintiff Randolph Phillips herein believed that they had obtained thereby the corroborative evidence judicially found sufficient to turn said hearsay information into admissible evidence of the actual fraud and sale of justice perpetrated by Referee-Special Master Robert J. Fitzsimmons for the benefit of defendant Allan P. Kirby, Sr. in the *Zenn* case.

10. Had not plaintiff Phillips herein attempted so to do with the aid of attorney Bobrick in *Smith* v. *Fitzsimmons* and the accompanying Rule 19 motion referred to therein, there is no doubt in plaintiff Phillips' mind that the oral contract which is the subject of the Complaint in this civil action 72-1544 would have been honored by both John E. Tobin, Esq. and Fred M. Kirby as Chairman of the board of of Alleghany Corporation and Investors Diversified Services, Inc., and with the aid of Robert M. Loeffler, Esq. But said attorneys and said Fred M. Kirby sought to disavow said contract and to breach it as a means of punishing plaintiff Randolph Phillips for his temerity in attempting to expose their fraud and that of Allan P. Kirby, Sr. Having lost in that attempt and not realizing that some day there might be brought to light the *secret ex parte visit* by John E. Tobin, Esq. to Henry J. Friendly, C.J. prior to the oral srgument in *Smith* v. *Fitzsimmons*, said attorneys and Fred M. Kirby authorized the rejection of plaintiff Randolph Phillips' claim asserted in the Complaint herein but still being apparently afraid to ~~so~~ contest against him in litigation over the claim could not make-up their minds to do so until the expiration ~~of~~ of 19 and 1/2 days of the 20 day period in which to answer the summons and complaint, in default of which they knew a default judgment would be entered. Plaintiff Randolph Phillips hereby alleges that said delay does not constitute "excusable neglect" nor any other ground, legal or equitable, for relief from the ~~the~~ default judgment herein entered on behalf of plaintiff; and that said facts show both the lack of any merit to any defense by Alleghany Corporation to the Complaint herein but also the

malice of said attorneys Tobin and Loeffler and Chairman Fred M. Kirby toward plaintiff for trying to discharge to the best of his ability, along with attorney Bobrick, the duty to expose improper conduct in the New York State Supreme Court and in the Second Circuit by the aforesaid judges, attorneys, and "the Kirby family".

11. At the minimum the Judges of this District Court should call upon the judges of the Second Circuit to institute an inquiry on their own motion of the matters relating to the improper judicial conduct herein disclosed and to that of said attorneys and Fred M. Kirby and to that end plaintiff Randolph Phillips respectfully requests the Honorable Marvin E. Frankel to circulate copies of the papers in this case to all the sitting judges of this United States District Court and of the United States Court of Appeals, for the Second Circuit as well as to the members of the Committee on the Judiciary of the House of Representatives and to the members of the United States Senate SubCommittee on Judicial Ethics. At the same time the Honorable Marvin E. Frankel is requested to forward a set of the papers herein to the appropriate disciplinary authorities of this Court, the Appellate Division, First Department, and of the Association of the Bar of the City of New York. 1/

WHEREFOR, this Court should dissolve and vacate forthwith its orders herein dated May 10,1972 and May 15,1972 and grant such other and different relief to plaintiff as is fair, equitable and just while at the same time subjecting Richard L. Bond, Esq. to the discipline and censure requested in plaintiff's Memorandum of Law.

RANDOLPH PHILLIPS

Affirmed to before me this
12th day of June, 1972.

1/ For said purposes this Court should order Alleghany by Fred M. Kirby to print at it or his expense said papers.

15

FILED IN CLERK'S OFFICE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

RANDOLPH PHILLIPS,

Plaintiff, : 72 Civ. 1544

-against-

INVESTORS DIVERSIFIED SERVICES, INC. and ALLEGHANY CORPORATION, : NOTICE OF MOTION

Defendants.

- x

S I R:

PLEASE TAKE NOTICE THAT, upon the summons and complaint herein, the annexed affidavit of Richard L. Bond, sworn to on June 8, 1972, and the exhibits thereto, and upon all prior proceedings herein, the undersigned will move this Court at the Civil Motion Part thereof, to be held on the 20th day of June, 1972, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, at Room 506 of the United States Courthouse, Foley Square, New York, New York, for an order pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, dismissing the complaint herein for lack of jurisdiction over the subject matter, and for such other and further relief as the Court may deem just and proper.

Dated: New York, New York
June 8, 1972

Yours, etc.

MARSHALL, BRATTER, GREENE,
ALLISON & TUCKER

By Richard L Bond
A Member of the Firm
Attorneys for Defendant
Investors Diversified
Services, Inc.
Office & P.O. Address
430 Park Avenue
New York, New York 10022

TO:

RANDOLPH PHILLIPS
Pro Se
30 East 72nd Street
New York, New York 10021

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RANDOLPH PHILLIPS,	:	
Plaintiff,	:	72 Civ. 1544
-against-	:	
INVESTORS DIVERSIFIED SERVICES, INC. and ALLEGHANY CORPORATION,	:	AFFIDAVIT
Defendants.	:	

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

RICHARD L. BOND, being duly sworn, deposes and says:

1. I am a member of the firm of Marshall, Bratter, Greene, Allison & Tucker, attorneys for defendants herein. This affidavit is submitted in support of a motion by defendant Investors Diversified Services, Inc. ("IDS") for an order, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, dismissing the complaint for lack of jurisdiction over the subject matter.

2. This action was commenced on April 20, 1972. Defendant IDS purportedly was served on May 19, 1972. Defendant Alleghany Corporation ("Alleghany") was served on April 20, 1972.

3. Plaintiff, Randolph Phillips ("Phillips"), is appearing pro se in this action.

4. Plaintiff's complaint, which is Exhibit A hereto, seeks from Alleghany and/or IDS "$94,950.00 plus 6%

interest compounded annually from October 13, 1964, to date". The supposed claim or claims arise from Phillips' alleged right to "indemnification and reimbursement" of his "reasonable expenses necessarily incurred in connection with his successful defense" of himself in a derivative action entitled Murchison, et al. v. Kirby, et al. (S.D.N.Y. 60 Civ. 3511), which was concluded as to Phillips in 1963, but not as to other defendants until some years thereafter. Phillips allegedly was sued in that action, in which IDS was not a party, "in his role as director" of IDS and "as a fiduciary for the common stockholders" of both Alleghany and IDS. He further contends that in 1964 he withdrew an application made in the prior litigation in reliance upon an oral "understanding and agreement" with Alleghany's officers and attorneys that, "if I would withdraw the application to this Court, Alleghany Corporation and if not Alleghany Corporation, then IDS, would pay me the aforesaid requested sum after the final determination of the litigation then pending".

5. The instant motion by IDS seeks an order dismissing the complaint upon the ground that the Court lacks jurisdiction over the subject matter of the action. The only jurisdictional allegations in the complaint are as follows:

> "1. Plaintiff Randolph Phillips is a citizen of the State of New York and defendant Investors Diversified Services, Inc. is a corporation incorporated under the laws of the State of Minnesota with its principal office in that State. Alleghany Corporation was plaintiff and Randolph Phillips a defendant in 60 Civil Action 3511 in this Court and by reason

> of said facts, this Court has inherent jurisdiction over said corporation and the subject matter herein. The amount in controversy, exclusive of interest and costs, exceeds $10,000.00."

6. Although plaintiff apparently seeks to sustain this Court's jurisdiction as to defendant IDS upon diversity of citizenship, his complaint carefully avoids any reference to the citizenship of defendant Alleghany. Plaintiff's complaint nowhere sets forth the citizenship of defendant Alleghany. As Mr. Phillips is well aware, the principal place of business of Alleghany was at the commencement of this action and presently is located at 350 Park Avenue, New York, New York 10022, and it is incorporated pursuant to Maryland law.

7. As shown by IDS' accompanying memorandum of law:

(a) Plaintiff's complaint is deficient because it fails to allege the citizenship of defendant Alleghany; and

(b) There is an absence of complete diversity of citizenship, since both Phillips and Alleghany are New York citizens for purposes of diversity jurisdiction.

WHEREFORE, it is respectfully requested that defendant IDS' motion be granted in all respects.

Richard L. Bond

Sworn to before me this
8th day of June, 1972.

Notary Public

BEVERLY SUE COLLIER
NOTARY PUBLIC, State of New York
No. [illegible]
Qualified in New York County
Commission Expires March 30, 1974

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Richard L. Bond, being duly sworn, deposes and says, that deponent is a member of Marshall, Bratter, Greene, Allison & Tucker, attorneys for the within named defendant Investors Diversified Services, Inc. herein. That deponent is over 18 years of age and is not a party to this action. That on the 8th day of June, 1972, deponent served a true copy of the within Notice of Motion and Affidavit upon Randolph Phillips, plaintiff pro se, by depositing a true copy of the same, on the table in the inside reception area of the building at 30 East 72nd Street, New York, New York, that being the address designated by Randolph Phillips for that purpose.

Richard L Bond
Richard L. Bond

Sworn to before me this

9th day of June, 1972

Beverly Sue Collier
Notary Public

BEVERLY SUE COLLIER
NOTARY PUBLIC, State of New York
No. 31-0707890
Qualified in New York County
Commission Expires March 30, 1973

29

FILED IN CLERK'S OFFICE
6/28/72

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - x

RANDOLPH PHILLIPS, :

Plaintiff, :

-against- : 72 Civ. 1544

INVESTORS DIVERSIFIED SERVICES, INC. and ALLEGHANY CORPORATION, : **NOTICE OF MOTION**

Defendants. :

- - - - - - - - - - - - - - - - - - - x

PLEASE TAKE NOTICE THAT, upon the summons and complaint herein, the annexed affidavit of Richard L. Bond, sworn to on June 27, 1972, and the exhibits annexed thereto, and upon all prior proceedings herein, the undersigned will move this Court in a Miscellaneous Part thereof, to be held on the 18th day of July, 1972, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, in Room 110 of the United States Courthouse, Foley Square, New York, New York, for an order:

(a) Pursuant to Rules 8(a)(1) and 12(b)(1) of the Federal Rules of Civil Procedure, dismissing the complaint as to defendant Alleghany Corporation for lack of jurisdiction over the subject matter;

(b) Alternatively, or in the event plaintiff is permitted to replead, pursuant to Rules 8(a)(1) and (2), 10(b) and 12(e) of the Federal Rules of Civil Procedure, directing plaintiff to plead a short, plain and more definite statement of the grounds upon which the Court's jurisdiction depends, and to plead a short and plain statement of each claim founded upon a separate transaction or occurrence more definitely in separate counts; and

(c) For such other and further relief as the Court may deem just and proper.

Yours, etc.

MARSHALL, BRATTER, GREENE,
ALLISON & TUCKER

By
A Member of the Firm
Attorneys for Defendant
Alleghany Corporation
430 Park Avenue
New York, New York 10022

Dated: New York, New York
June 27, 1972

TO:

Randolph Phillips
Plaintiff Pro Se
30 East 72nd Street
New York, New York 10021

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - x

RANDOLPH PHILLIPS, :

Plaintiff, :

-against- :

INVESTORS DIVERSIFIED SERVICES, :
INC. and ALLEGHANY CORPORATION, :

Defendants. :

- - - - - - - - - - - - - - - - - - x

72 Civ. 1544

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

RICHARD L. BOND, being duly sworn, deposes and says:

1. I am a member of the firm of Marshall, Bratter, Greene, Allison & Tucker, attorneys herein for defendant Alleghany Corporation ("Alleghany"). This affidavit is submitted in support of a motion by Alleghany for an order:

(a) Pursuant to Rules 8(a)(1) and 12(b)(1) of the Federal Rules of Civil Procedure, dismissing the complaint as to defendant Alleghany Corporation for lack of jurisdiction over the subject matter; and

(b) Alternatively, or in the event plaintiff is permitted to replead, pursuant to Rules 8(a)(1) and (2), 10(b) and 12(e) of the Federal Rules of Civil Procedure, directing plaintiff to plead a short, plain and more definite statement of the grounds upon which the Court's jurisdiction depends, and to state each claim founded upon a separate transaction or occurrence more definitely in separate counts.

RELEVANT PRIOR PROCEEDINGS

2. This action was commenced on April 20, 1972, and defendant Alleghany was served on that day. On information and belief, defendant Investors Diversified Services, Inc. ("IDS"), which my firm also represents herein, purportedly was served on May 19, 1972.

3. Plaintiff, Randolph Phillips ("Phillips"), is a non-lawyer who is appearing pro se in this action.

4. Plaintiff's complaint, which is Exhibit A hereto, seeks from Alleghany and/or IDS "$94,950.00 plus 6% interest compounded annually from October 13, 1964, to date". The supposed claim or claims arise from Phillips' alleged right to "indemnification and reimbursement" of his "reasonable expenses necessarily incurred in connection with his successful defense" of himself in a derivative action entitled Murchison, et al. v. Kirby, et al. (S.D.N.Y., 60 Civ. 3511), which was concluded as to Phillips in 1963, but not as to other defendants until some years thereafter. Phillips allegedly was sued in that action, in which IDS was not a party, "in his role as director" of IDS and "as a fiduciary for the common stockholders" of both Alleghany and IDS. He further contends that in 1964 he withdrew an application made in the prior

litigation in reliance upon an oral "understanding and agreement" with Alleghany's officers and attorneys that, "if I would withdraw the application to this Court, Alleghany Corporation and if not Alleghany Corporation, then IDS, would pay me the aforesaid requested sum after the final determination of the litigation then pending".

5. Phillips obtained a default judgment herein against Alleghany on May 12, 1972, despite Alleghany having timely obtained on May 10 an order extending to June 2, 1972 its time to move or answer. Upon discovery of the default judgment, which Phillips declined to vacate by agreement, on May 15, 1972, Alleghany obtained a stay of execution on the judgment pending determination of a motion to vacate the default and for other relief. That motion originally returnable on May 18, was not decided until June 15, 1972. In the interim, to protect its right to appeal from entry of the default judgment were it not vacated, on June 8, 1972, Alleghany filed a notice of appeal from the judgment, and on June 15, 1972, Judge Frankel issued an opinion and order vacating the default judgment and granting other relief to Alleghany. A copy of Judge Frankel's opinion and order, which is discussed infra, is Exhibit B hereto.

6. On June 16, 1972, Phillips moved to reargue Judge Frankel's decision, based primarily upon the Judge's supposedly improper failure to reveal his participation in 1958 in litigation which Phillips contends was related

to the instant action. The reargument motion is sub judice.

7. The other defendant, IDS, moved to dismiss the complaint as to it for lack of subject matter jurisdiction. There was no opposition by Phillips, and the motion was granted on June 20. As directed by Judge Gurfein, a proposed order was submitted, on notice to Phillips; on information and belief, the proposed order dismissing as to defendant IDS has not yet been signed.

THE INSTANT MOTION

8. The only jursidictional allegations in the complaint are as follows:

> "1. Plaintiff Randolph Phillips is a citizen of the State of New York and defendant Investors Diversified Services, Inc. is a corporation incorporated under the laws of the State of Minnesota with its principal office in that State. Alleghany Corporation was plaintiff and Randolph Phillips a defendant in 60 Civil Action 3511 in this Court and by reason of said facts, this Court has inherent jurisdiction over said corporation and the subject matter herein. The amount in controversy, exclusive of interest and costs, exceeds $10,000.00."

9. It is apparent that the complaint fails to satisfy requirements for subject matter jurisdiction based upon diversity of citizenship. There is an apparently intentional failure to allege the state of incorporation and principal place of business of defendant Alleghany, which respectively are Maryland and New York. Since Phillips alleged that he "is a citizen of the State of New York," diversity of citizenship with respect to defendant Alleghany does not exist. This absence of

complete diversity was the basis for the IDS dismissal motion made before Judge Gurfein, a position that Phillips did not oppose.

10. As to defendant Alleghany, the complaint does not appear to assert subject matter jurisdiction based upon diversity of citizenship. Rather, it alleges that, "Alleghany Corporation was plaintiff and Randolph Phillips a defendant in 60 Civil Action 3511 in this Court and by reason of said facts, this Court has inherent jurisdiction over said corporation and the subject matter herein". This concept of "inherent jurisdiction," whatever it is intended to mean, is not supported by a short and plain or definite statement as to why or how it supposedly exists.

11. The complaint's jurisdictional allegations as to Alleghany do not appear to meet the requirements of Rules 8(a)(1), 12(b)(1) or 12(e), since they do not present "a short and plain statement of the grounds upon which the Court's jurisdiction depends," do not support the Court's "jurisdiction over the subject matter" of the action, and are "so vague and ambiguous" that Alleghany "cannot reasonably be required to frame a responsive pleading" with respect to them.

12. It is further urged on this motion that Phillips' complaint fails to meet the requirements of Rules 8(a)(1) and (2), 10(b) and 12(e) in its attempt to set forth one or more claims against the defendants. In addition to the above-noted specific requirements of Rule 8(a)(1) as to jurisdictional allegations, the

complaint apparently seeks to assert a variety of claims founded upon separate transactions and occurrences in the period 1963-1970, all of which are pled together. The net effect is to make the pleading so vague and ambiguous that Alleghany cannot reasonably be expected to intelligently frame affirmative defenses in response thereto.

13. The complaint could be read, for example, to be based upon (1) breach of oral contract; (2) the alleged June 5, 1963 letter of Robert N. Loeffler, Esq., of Donovan Leisure Newton & Irvine; (3) the by-laws of Alleghany,; (4) the by-laws of IDS; (5) the statutes of New York; (6) the statutes of Maryland; (7) the statutes of Minnesota; (8) fraud; (9) any combination thereof; or (10) some other theory. Moreover, it is impossible to tell from the complaint in its present form which claims, if more than one is intended, are asserted against Alleghany, against IDS, or against both defendants.

RELEVANT FACTS CONCERNING PLAINTIFF

14. In determining whether Phillips should be required to comply more closely with pleading requirements of the Rules, it is important that the Court be advised concerning Randolph Phillips and his pro se conduct of this action in the brief time it has been pending. As hereinafter shown, although Phillips is not a member of this or any other bar, he holds himself out as a "lawyer," an "attorney," and a "consultant to attorneys". Indeed, Phillips apparently has been involved for much of his adult life in litigation, and he is no stranger to the

conduct of or rules governing litigation, which he has demonstrated a proclivity to ignore when that suits his purposes.

15. Judge Frankel's opinion herein (Exhibit B) noted that Phillips had "filed voluminous and gratuitous attacks upon various state and federal judges; . . . festooned his papers with baseless and essentially irrelevant charges of fraud, including 'fraud upon this court,' malice, 'hidden motives,' and . . . the 'obvious ignorance' of counsel for defendant." (Id. at pp.3-4). He found that Phillips' actions, in "what should have been routine correction of a situation that should never have existed in the first place, have been prolonged and exasperating beyond any due measure." (Ibid., p.3). Further that, "the main causes of the unpleasantnesses have been the tenacious bellicosity and abusiveness of the plaintiff" (Ibid.). So extreme has been Phillips' conduct that Judge Frankel ordered further submissions in support of possible award of attorneys' fees and costs to Alleghany. (Ibid., p.6).

16. Outrageous abuse of his position as a pro se litigant is not a new method of operation for Mr. Phillips. In an opinion by Judge Kaufman, concurred in by Judges Clark and Friendly, the Second Circuit Court of Appeals admonished Phillips in Ackert v. Bryan (decided on June 21, 1963), for hurling "thoroughly unsubstantiated charges [of fraud] at reputable counsel," and noting his "cavalier

and outrageous use of the federal courts -- and indeed other forums -- for his unrestrained attacks upon the personal veracity and professional competence of counsel". Of particular significance to the instant motion, Judge Kaufman also stated:

> "He [Phillips] comes before this Court wearing the cloak of a pro se applicant, and seeks to extract from us the solicitude ordinarily afforded one appearing without counsel. But this should not shield him from rebuke when merited. He is an intelligent, able and sophisticated litigant, who is no stranger to this Court, having appeared frequently in his own behalf both in the District Court and the Court of Appeals. We would expect that one possessed of his background would be conscious of the outer limits of forceful advocacy and fully aware when his acts transgress those limits. Moreover, we are not to be manipulated by resourceful but meritless moves in a long-closed litigation, moves which serve only to distract us from important judicial business."

A full copy of the above opinion is Exhibit C hereto.

17. Mr. Phillips has taken the position in an affirmation (dated May 25, 1972) filed herein that he somehow is a "lawyer" and an "attorney". Moreover, in a May 31, 1972 advertisement in The New York Times, entitled "A Resolution to Impeach Richard M. Nixon as President of the United States," Phillips identifies himself as an "attorney pro se, consultant to attorneys (1944-1972)". The relevant portion of this advertisement is annexed as Exhibit D.

18. There is no doubt that Phillips is not a typical pro se plaintiff. In appearances and papers herein, he regularly has cited to specific sections of the Federal Rules of Civil Procedure, Rules promulgated by this Court, opinions and statutes. In addition, Phillips

represented to Judge Frankel at oral argument that he has a private library in which he does his legal work and had attorneys (admitted to the bar) with whom he consulted in connection with his legal activities.

19. The point of the above is that, absent firm direction from the Court that Phillips strictly comply with the Rules, this lawsuit will continue to be conducted by him in the same outrageous manner he previously has employed. Alleghany already has been compelled to incur substantial and needless expense, and this busy Court has been caused to devote large amounts of its time because of Phillips' intemperate conduct. Under these circumstances, it is urged that the just, speedy and inexpensive determination of this action mandates that Phillips be required to properly plead the Court's jurisdiction, if any there be, and the cause or causes of action, if any there are, that he seeks to assert against each defendant herein. In this fashion, this action hopefully can be dismissed at an early point or confined to matters that are genuinely relevant.

WHEREFORE, it is respectfully requested that defendant Alleghany's motion be granted in all respects.

Richard L. Bond
Richard L. Bond

Sworn to before me this
27th day of June, 1972.

Beverly Sue Collier
Notary Public

BEVERLY SUE COLLIER
NOTARY PUBLIC, State of New York
No. 31-0707390
Qualified in New York County
Commission Expires March 30, 1973

36

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - x

RANDOLPH PHILLIPS, :

Plaintiff, :

-against- : 72 Civ. 1544

INVESTORS DIVERSIFIED SERVICES, INC. and ALLEGHANY CORPORATION, : **NOTICE OF MOTION**

Defendants. :

- - - - - - - - - - - - - - - - - - x

PLEASE TAKE NOTICE THAT, upon the summons and complaint herein, the annexed affidavit of Richard L. Bond, sworn to on July 7, 1972, and the exhibits annexed thereto, and upon all prior proceedings herein, the undersigned will move this Court in a Miscellaneous Part thereof, to be held on the 18th day of July, 1972, at 10 30AM o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, in Room 110 of the United States Court House, Foley Square, New York, New York for an order pursuant to Rule 42(a) of the Federal Rules of Appellate Procedure, dismissing the appeal filed on June 8, 1972 by Alleghany Corporation from a judgment by default entered improperly in this action on May 12, 1972, and for such other and further relief as the Court may deem just and proper.

Yours, etc.

MARSHALL, BRATTER, GREENE,
ALLISON & TUCKER
By
A Member of the Firm
Attorneys for Defendant
Alleghany Corporation
430 Park Avenue
New York, New York 10022

Dated: New York, New York
July 7, 1972

TO:

Randolph Phillips, Plaintiff Pro Se
30 East 72nd Street
New York, New York 10021

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - x

RANDOLPH PHILLIPS,	:	
Plaintiff,	:	
-against-	:	72 Civ. 1544
INVESTORS DIVERSIFIED SERVICES, INC. and ALLEGHANY CORPORATION,	:	AFFIDAVIT
	:	
Defendants.	:	

- - - - - - - - - - - - - - - - - - x

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

RICHARD L. BOND, being duly sworn, deposes and says:

1. I am a member of the firm of Marshall, Bratter, Greene, Allison & Tucker, attorneys herein for defendant Alleghany Corporation ("Alleghany"). This affidavit is submitted in support of a motion by Alleghany for an order pursuant to Ryle 42(a) of the Federal Rules of Appellate Procedure dismissing the appeal by Alleghany from a judgment by default entered improperly on May 12, 1972.

2. This action was commenced on April 20, 1972, and defendant Alleghany was served on that day. On information and belief, defendant Investors Diversified Services, Inc. ("IDS"), which my firm also represents herein, purportedly was served on May 19, 1972.

3. Plaintiff, Randolph Phillips ("Phillips"), is a non-lawyer who is appearing pro se in this action.

4. Plaintiff's complaint, which is Exhibit A hereto, seeks from Alleghany and/or IDS "$94,950.00 plus 6% interest compounded annually from October 13, 1964, to

date". The supposed claim or claims arise from Phillips' alleged right to "indemnification and reimbursement" of his "reasonable expenses necessarily incurred in connection with his successful defense" of himself in a derivative action entitled Murchison, et al. v. Kirby, et al. (S.D.N.Y., 60 civ. 3511), which was concluded as to Phillips in 1963, but not as to other defendants until some years thereafter. Phillips allegedly was sued in that action, in which IDS was not a party, "in his role as director" of IDS and "as a fiduciary for the common stockholders" of both Alleghany and IDS. He further contends that in 1964 he withdrew an application made in the prior litigation in reliance upon an oral "understanding and agreement" with Alleghany's officers and attorneys that, "if I would withdraw the application to this Court, Alleghany Corporation and if not Alleghany Corporation, then IDS, would pay me the aforesaid requested sum after the final determination of the litigation then pending".

5. Phillips obtained a default judgment herein against Alleghany on May 12, 1972, despite Alleghany having timely obtained on May 10 an order extending to June 2, 1972 its time to move or answer. Upon discovery of the default judgment, which Phillips declined to vacate by agreement, on May 15, 1972, Alleghany obtained a stay of execution on the judgment pending determination of a motion to vacate the default and for other relief. That motion, originally returnable on May 18, was not decided

until June 15, 1972.

6. In the interim, to protect its right to appeal from entry of the default judgment were it not vacated, on June 8, 1972, Alleghany filed a notice of appeal from the judgment, a copy of which is annexed hereto as Exhibit B. No other action has been taken to perfect the appeal, and the appeal has not been docketed.

7. On June 15, 1972, Judge Frankel issued an opinion and order vacating the default judgment and granting other relief to Alleghany. A copy of Judge Frankel's opinion and order is annexed hereto as Exhibit C.

8. On June 16, 1972, Phillips moved to reargue Judge Frankel's decision, based primarily upon the Judge's supposedly improper failure to reveal his participation in 1958 in litigation which Phillips contends was related to the instant action. A copy of Judge Frankel's opinion and order denying the motion for reargument is annexed hereto as Exhibit D.

9. By reason of the order vacating the judgment by default from which Alleghany appealed, and because the appeal in any event may not be valid because the judgment by default was not entered in compliance with Rule 54(b) of the Federal Rules of Civil Procedure, Alleghany respectfully urges that its motion to dismiss the appeal be granted.

Richard L. Bond

Sworn to before me
this 7th day of June, 1972.

Notary Public

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Richard L. Bond, being duly sworn, deposes and says, that deponent is a member of Marshall, Bratter, Greene, Allison & Tucker, attorneys for the within named defendant Alleghany Corporation herein. That deponent is over 18 years of age and is not a party to this action. That on the 7th day of July, 1972, deponent served a true copy of the within Notice of Motion and Affidavit upon Randolph Phillips, pro se, by depositing a true copy of the same, on the table in the inside reception area of the building at 30 East 72nd Street, New York, New York, that being the address designated by Randolph Phillips for that purpose.

Richard L Bond
Richard L. Bond

Sworn to before me this
10th day of July, 1972.

Beverly Sue Collier
Notary Public

[illegible] COLLIER
NOTARY [illegible]
No. [illegible]
Qualified in [illegible]
Commission Expires [illegible] 30, 1973

16

60a

filed 7/18/72

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RANDOLPH PHILLIPS,

Plaintiff,

-against-

ALLEGHANY CORPORATION and INVESTORS DIRECTOR SERVICES, INC.,

Defendants.

----

72 Civil 1544

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Randolph Phillips, plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from (1) an order of this Court per Frankel, D.J., entered pursuant to "MEMORANDUM", each dated and filed June 15, 1972, granting defendant Alleghany Corporation's motion to vacate a default judgment obtained by plaintiff in the amount of $137,696.82, and (2) denying plaintiff's motion for relief herein, and (3) the order of this Court per Frankel, D.J. denying plaintiff's motion for reargument, dated and filed July 3, 1972.

RANDOLPH PHILLIPS
Attorney Pro Se
30 East 72nd Street
New York, N.Y. 10021

cc: Clerk, United States District Court
Southern District of New York

Richard L. Bond, Esq.
Attorney for defendant Alleghany Corporation
Marshall Bratter Green Alleison & Tucker
430 Park Avenue, New York, N.Y. 10022

Index No. 72 Civ. 1584 Year 19

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RANDOLPH PHILLIPS,

Plaintiff,

-against-

INVESTORS DIVERSIFIED SERVICES, INC. and ALLEGHANY CORPORATION,

Defendants.

Original

NOTICE OF MOTION and AFFIDAVIT

MARSHALL, BRATTER, GREENE,
ALLISON & TUCKER

Attorneys for Alleghany Corporation

430 PARK AVENUE
BOROUGH OF MANHATTAN
New York, N. Y. 10022
Telephone No.: 212—421-7200

Service of a copy of the within

is hereby admitted

JUL 20 1972

[illegible]

[illegible] on June 15, 1972 by [illegible]

[illegible] Appeals [illegible]

[illegible] to F.R. App.P. [illegible]

[illegible]

U.S. DISTRICT [illegible] JUL 21 1972

As the judgment appealed from has been vacated on June 15, 197 by Judge Frankel of this Court, the appeal is mooted. The appeal has not been docketed in the Court of Appeals. It is hereby dismissed pursuant to F.R.App.P. 42(a). Motion granted.

SO ORDERED Charles L. Brieant, J
U.S.D.J.

July 20, 1972

48

filed 8/10/72

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RANDOLPH PHILLIPS,

Plaintiff,

72 Civil 1544

NOTICE OF APPEAL

-against-

ALLEGHANY CORPORATION and
INVESTORS DIVERSIFIED SERVICES, INC.,

Defendants.

PLEASE TAKE NOTICE that Randolph Phillips, plaintiff herein, hereby appeals to the United States Court of Appeals for the Second Circuit from the Memorandum Order of this Court dated July 20, 1972, and filed herein on July 21, 1972, dismissing the appeal of defendant Alleghany Corporation filed herein on June 8, 1972.

Dated: New York, N.Y.
August 8, 1972.

RANDOLPH PHILLIPS
Attorney Pro Se
30 East 72nd Street
New York, N.Y. 10021

TO: Clerk, United States District Court
Southern District of New York

Richard L. Bond, Esq.
Attorney for Defendant Alleghany Corporation
Marshall Bratter Greene Allison & Tucker
430 Park Avenue, New York, N.Y. 10022

Mike Graham?

Motion #48

FILED
SEP 25 1972
S.D. OF N.Y.

Endorsement and Order

RANDOLPH PHILLIPS, Plaintiff v. INVESTORS DIVERSIFIED SERVICES, INC. and ALLEGHANY CORPORATION, Defendants Pro Se 72 Civ. 1514

Motion to dismiss as to defendant Alleghany Corporation is granted. The complaint does not plead a recognized statutory basis for subject matter jurisdiction over movant as required by Rule 8(a)(1), F.R.Civ.P.

In the absence of subject matter jurisdiction an action may be dismissed, either on motion of a party, or on the Court's own motion. Rule 12(h)(3), F.R.Civ.P.

Movant (not plaintiff) suggests to the Court that:

> "There is sub judice before Your Honor in the above matter a motion by defendant Alleghany Corporation to dismiss for lack of subject matter jurisdiction.
>
> The purpose of this letter is to advise Your Honor that:
>
> (1) On or about July 18, 1972, Mr. Phillips filed a notice of appeal from two orders by Judge Frankel, respectively dated June 15 and July 3, 1972, which vacated a default judgment improperly entered herein against defendant Alleghany Corporation and denied reargument of that decision.
>
> (2) In a recent motion filed in this action by Mr. Phillips in the Court of Appeals, he has taken the position that the District Court was deprived of jurisdiction to resolve motions which were sub judice before it at the time when Mr. Phillips filed his notice of appeal."

We are a statutory court; we may, and indeed must, in compliance with Rule 12(h)(3), dismiss whenever lack of subject matter jurisdiction is apparent. If the mere taking of an interlocutory appeal ousted our jurisdiction as to all matters, there would be no purpose in or need for Rule 62(g), F.R.Civ.P., which

430

allows the Court of Appeals to stay all proceedings during the pendency of an appeal. See U.S. v. 329.22 Acres of Land, etc., 307 F.Supp. 34, 52 (M.D. Fla. 1968), aff'd, 418 F.2d 551

So Ordered.

Dated: New York, New York
September 25, 1972

Charles L. Brieant Jr.
CHARLES L. BRIEANT, JR.
U. S. D. J.

23 RP

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

1,899 hours
days

RANDOLPH PHILLIPS,

Plaintiff,

-against-

ALLEGHANY CORPORATION and INVESTORS DIVERSIFIED SERVICES, INC.,

Defendants.

---

72 Civil 1544 (Brieant, Jr., District Judge)
MOTION FOR REARGUMENT
Pursuant to Rule 9(m) of the General Rules of this Court.

Dorouse Lever
or notice
Sept 24 61

NOW COMES RANDOLPH PHILLIPS, plaintiff herein, and on the basis of the accompanying memorandum respectfully petitions this Honorable Court for reargument of the motion by defendant Alleghany Corporation, which motion was granted by this Court by Order filed September 25, 1972, and dismissed the complaint as to defendant Alleghany Corporation on the ground that the complaint does not plead "a recognized statutory basis for subject matter jurisdiction over movant as required by Rule 8(a)(1), F. R. Civ. P.

Said motion will be returnable before the Honorable Judge Brieant on October ~~15~~ 17, 1972.

Dated: New York, N.Y.
October 4, 1972

Yours, etc.
RANDOLPH PHILLIPS
Plaintiff Pro Se
30 East 72nd Street
New York, N.Y. 10021

TO: Richard L. Bond, Esq.
Attorney for defendants
Marshall Bratter Greene Allison & Tucker
430 Park Avenue
New York, N.Y. 10022

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MEMO. ENDORSED

U.S. DISTRICT COURT
FILED
OCT 1 1964
S.D. OF N.Y.

ALLEGHANY CORPORATION,

Plaintiff

-against-

60 Civil 3515

ALLAN P. KIRBY, RANDOLPH PHILLIPS, FRED M. KIRBY and CHARLES T. IRELAND, JR.,

Defendants.

NOTICE OF MOTION

PLEASE TAKE NOTICE, that upon the annexed application and affidavit in support thereof of Randolph Phillips, affirmed to September 21, 1964, and upon all the proceedings heretofore had herein relating to issue (1), as defined by this Court in its opinion reported at 218 F.Supp. 164,176, of the Amended and Supplemental Complaint, the undersigned will move this Court at a motion term thereof to be held in Room 506 of the United States Courthouse, Foley Square, in the Borough of Manhattan, City and State of New York on the 6th day of October, 1964, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard for an order directing Alleghany Corporation, plaintiff herein, to pay to applicant the sum of $94,950.00 as his reasonable expenses necessarily and actually incurred in connection with his successful defense of this action.

YOURS, etc.

Dated: September 24, 1964.

RANDOLPH PHILLIPS,
Pro Se
128 East 70th Street
New York 10021, N. Y.
Re 7-0244; Re 4-6776

TO:

TOWNLEY, UPDIKE, CARTER & RODGERS
Attorneys for Plaintiff,
220 East 42nd Street
New York 10017, N. Y.

DONOVAN, LEISURE, NEWTON & IRVINE
Attorneys for Defendants Allan P. Kirby,
Fred M. Kirby, and Charles T. Ireland, Jr.
2 Wall Street
New York 5, N. Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALLEGHANY CORPORATION,

Plaintiff,

-against-

60 Civil 3511

ALLAN P. KIRBY, RANDOLPH PHILLIPS,
CHARLES T. IRELAND, JR. and FRED M.
KIRBY,

Defendants.

APPLICATION FOR INDEMNIFICATION OF EXPENSES OF DEFENDANT RANDOLPH PHILLIPS

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

RANDOLPH PHILLIPS, defendant herein, being duly affirmed deposes and says:

1. This is an application by me for an order of this Court directing defendant Alleghany Corporation (September 8, 1960 to June 27, 1962), which became plaintiff herein on June 27, 1962 by reason of an order of substitution, to pay to me my expenses in reasonable amount as actually and necessarily incurred in connection with the successful defense of this action by me.

2. The complaint herein, after trial on the merits, and as amended and supplemented was dismissed as to all defendants by a final judgment entered on June 5, 1963, pursuant to opinion of this Court filed on May 28, 1963. (218 F.Supp.164). No appeal was taken

from that part of the final judgment dismissing the complaint as to applicant herein, and the time for such an appeal has expired.

3. This application is authorized under the common law (2 Restatement, Agency (Second), Sec. 438 et seq. (1958)); also under Article 23, Section 60(a) and (b) of the Code of Public General Laws of Maryland, relating to Corporations; and also under Sections 722, 723 and 725 (1) of the New York Business Corporation Law, which law applies to foreign corporations doing business in this State.

4. Alleghany Corporation is incorporated in the State of Maryland. Its principal business office now is at 350 Park Avenue, New York City.

5. The complaint herein alleged 2 counts. Under the First Count I was sued for an alleged breach of my trust as a fiduciary of Alleghany Corporation and its stockholders in negotiating or aiding in the negotiation of certain derivative actions. It was alleged that I was "bribed" by the offer of certain emoluments and of a seat as a director of Investors Diversified Services, Inc. to settle these derivative actions insofar as the liability of Allan P. Kirby was concerned, at an inadequate price and in fraud of this Court, the New York State Supreme Court, Alleghany Corporation and its directors. Under the Second Count of the original complaint I was sued as a director of IDS, and a preliminary and permanent injunction was sought against my continuance in service as a director. Both counts requested an accounting from me of the fees I received as a consultant to Alleghany Corporation and as Chairman of the IDS Finance & Law Committee, as well as other relief.

6. At all times relevant herein Alleghany Corporation controlled IDS by reason of ownership of 47.6% of the latter's voting stock.

7. On April 19, 1960 I was nominated by Alleghany Corporation as a director of IDS and on that date I was elected a director as a result of the votes cast by Alleghany Corporation. The present action was instituted against defendants, including myself, because of the fact of my nomination and election as an IDS director.

8. On September 8, 1960 when this action was instituted I was serving as

(A) Consultant to Alleghany Corporation, at a fee of $5,000.00 per quarter year, or $20,000.00 annually.

(B) Chairman of the IDS Finance & Law Committee of the Board of Directors at a monthly salary of $2,500.00, or $30,000.00 annually.

9. From on or about January, 1955 to June 21, 1960 I served as consultant to counsel in the aforesaid derivative litigation and the proceedings relating to settlement thereof. These actions were settled in December, 1959 by the payment of $3,000,000 cash by defendants Estate of Robert R. Young, Allan P. Kirby and Murchison Brothers, and by the return of control of the $3 billion IDS investment company system to Alleghany Corporation by the Murchison Brothers. Counsel for Alleghany Corporation in the present action alleged that I was the person chiefly responsible for this settlement.

10. I have been active as consultant to corporate managements and shareholders over a period of more than 24-years. A brief biography of myself appears in "Who's Who in America," Vol. 32, 1962-1963, a photocopy of which biography is appended hereafter as Exhibit "A".

11. I appeared pro se in the defense of this action, and in so doing I made the following expenditure of time:

(A) Attendance at depositions in New York City (years 1960, 1961, 1962, and 1963) on 177 days (see Exhibit "B" hereinafter appended)	= 780 hours
(B) Attendance at depositions in Palm Beach, Florida, including 1-day's travel time to and return, February 11-14, 1963	= 5 days
(C) Pre-trial court appearances (47 in number, see Exhibit "B") at an estimate of only 1-hour each	= 47 hours
(D) Motion papers, affidavits, briefs and reply briefs on motions where applicant was moving party, estimated hours based on 182 pages of applicant's briefs and 88 pages of applicant's own affidavits, or total pages of 270 pages at an estimate of 1-hour per page research, record analysis and other preparation	= 270 hours
(E) Pre-Trial Memorandum of applicant, 102 pages, at an estimate of 1-hour per page research, record analysis and other preparation	= 102 hours
(F) Pre-trial conferences (years 1960, 1961, 1962, and 1963) with counsel for co-defendants; analysis of other parties' motion papers, replies thereto; analysis of 20,000 pages pre-trial depositions; analysis of 612 marked exhibits; telephone consultations with counsel for co-defendants; minimum estimate	= 600 hours
(G) Trial, April 1 through 19, 1963	= 15 days
RECAPITULATION = 20 days at 6 hours per day; items (B) and (G) above	= 120 hours
= Total of items (A), (C), (D), (E) and (F) above	= 1,799 hours
TOTAL HOURS EXPENDED	= 1,899 hours

12. The fair and reasonable value of applicant's time as above expended is $50 per hour, or $94,950 for said 1,899 hours.

13. The Special Master herein received with the consent of the parties $60 per hour for some 846 hours, or $50,760, for his services herein. All other parties to this action have had their reasonable ex-

penses, including attorney's fees, paid or reimbursed in whole or in part or reserved the right so to do pending the determination by the Court of Appeals of issue (2), as defined by this Court in its opinion reported at 218 F. Supp. 164, 182. Applicant herein was not a party defendant with respect to that issue.

14. The expenditure by applicant of the above-stated 1,899 hours of time was reasonably and necessarily incurred by him in the successful defense of this action.

15. Had applicant not successfully defended this action as a fiduciary Alleghany would have been compelled to return all or part of some $3,000,000 cash received in settlement thereof, and also a possibility existed that it might have been compelled to return 130,000 shares of the common (voting) stock of IDS, representing the control of that corporation.

16. This application is intended to cover and does cover time expended by applicant in the successful defense of the complaint in Freeman v. Kirby, 27 F.R.D. 395 (1961), SDNY, in which action he was also a party defendant. As shown by the foregoing decision that action was dismissed by the late Judge Bicks for violation of Rule 11, F.R.C.P., which prohibits the filing of "sham" pleadings.

WHEREFORE applicant Randolph Phillips respectfully prays this Honorable Court to issue an order directing Alleghany Corporation, plaintiff herein, to pay to him the sum of $94,950.00 as his reasonable expenses actually and necessarily incurred in connection with his successful defense of this action.

RANDOLPH PHILLIPS

WILLIAM KLASS
Notary Public, State of New York
No. 41-7237000 Queens County
Certificate filed in New York County
Term Expires March 30, 1966

Affirmed to before me this

21st day of September, 1964.

3,742

BEST COPY AVAILABLE

EXHIBIT "A"

N.Y. Mem. Am. for Dem. Action. Democrat. Methodist. Mason (Shriner). [illegible] N.Y. Office: Paper Makers Bldg., [illegible] N.Y.

PHILLIPS, Percy Tea[illegible], dentist; b. N.Y.C., Apr. 7, 1[illegible]; s. Percy [illegible] and Mary Elizabeth (Taylor) P.; student [illegible]; D.D.S., [illegible]; LL.D., [illegible] U., 1953; m. [illegible]; practicing dentist, N.Y.C., [illegible] 1948-[illegible]; [illegible] Dept. Def., 1948, civilian cons. [illegible]; nat. adv. com. [illegible] V.A. Decorated [illegible]; received [illegible] Jarvie medal, [illegible] N.Y.U. Coll. Dentistry, William Jarvie [illegible]; also Pierre Fauchard [illegible]. Fellow of the American College of Dentists, [illegible] Dentists, New York Acad. Dentistry, N.Y. [illegible] Clin. Oral Pathology, [illegible] Acad.; mem. Am. Dental Assn. (pres. [illegible], speaker ho. of dels.), dental soc. State of N.Y. (pres.), Bronx ([illegible] pres.), [illegible] dental socs., Found. Denture [illegible], Nat. Health Council, N.Y. Acad. Dentistry, [illegible] Pub. Health Assn., [illegible] Circle, White Plains, N.Y. Office: [illegible] St., N.Y.C. 17.

PHILLIPS, Percy W[illegible], lawyer; b. [illegible]hampton, N.Y., June 2, [illegible]; s. W[illegible] (Hurd) P.; LL.B., Cornell U., [illegible]; m. Margaret Richards Terrell, [illegible]; children—Margaret Terrell [illegible] Harnes, Alan Terrell [illegible]; married second, [illegible]. Admitted to New York bar, [illegible]; practice of law with [illegible], N.Y. City; mem. [illegible] to enter law practice [illegible] firm of [illegible]; University of N.C., 1927-33, [illegible] as 1st lt., Field [illegible]. Mem. Am. Bar Assn. [illegible] of Dels., 1947-[illegible]; N.Y. State [illegible] N.Y. bar assns., [illegible] Republican. [illegible] Cornell [illegible] Columbia Country [illegible] Federal Gift Tax, [illegible]. Contbr. numerous articles [illegible]. Home: Chevy Chase, [illegible]. Office: Southern Bldg., Washington, D.C.

PHILLIPS, [illegible], archeologist; b. Buffalo, Aug. 11, [illegible]; s. [illegible]; A.B., Williams Coll., [illegible]; [illegible] Harvard, [illegible]; Ph.D., [illegible]; m. [illegible], June 27, [illegible]; children—[illegible] Daniel [illegible] (Mrs. Stanley [illegible]). [illegible] Practice of architecture, Buffalo, [illegible]; asst. curator [illegible], Harvard, [illegible] curator, [illegible] River Valley, [illegible] Lower Mississippi Valley, 1940, 41, 46, 47, 48, [illegible] Pacific Ocean Area, [illegible]. Fellow American Anthropological Society, Society of Antiquaries of London; mem. Soc. Am. Archaeology, [illegible] Applied Anthropology, [illegible] Am. Acad. Arts and Scis. Author: Method and Theory in Am. Archaeology (with Gordon R. Willey), 1958. Contbr. articles profl. publs. Home: 25 Garden St., Cambridge 38, Mass.

PHILLIPS, Philip Gea., personal investments; b. Knoxville, Ia., Oct. 3, [illegible]; s. Lee [illegible] and Lenora (Carr) P.; A.B., Kan. U., 1926. With Phillips Petroleum Co., Bartlesville, Okla., 1927-42, asst. sales manager, sales dept., [illegible]-42, dir., [illegible]—; engaged in personal investments since 1940 (independent oil producer and rancher); v.p. and dir. Crystal Ice and Frozen Food Lockers, Inc., since 1950; dir. First Nat. Bank of Bartlesville. Board trustees Jane [illegible] Phillips [illegible], Inc., Bartlesville. Served as lt. [illegible] U.S. Naval Reserve, 1942-46. Mem. Okla. [illegible] Assn. ([illegible]), Bartlesville C. of C. ([illegible]), Grand Central Art Galleries (N.Y. City), Beta Theta Pi. Republican. Mem. Christian Ch. Mason (32°, K.T.). Clubs: Armour and Arms (New York); Garden of the Gods (Colorado Springs, Colo.); River [illegible] City, Mo.); Southern Hills Country (Tulsa, Okla.); Hillcrest Country (Bartlesville). Home: [illegible] Cherokee Av. Office: First National Bank Bldg., Bartlesville, Okla.

PHILLIPS, Ralph E., investment banking; b. Kansas, Sept. 8, [illegible]; s. Charles and Mary P.; A.B., U. of Calif., 1921; student Babson Statistical Inst., Wellesley Hills, Mass., [illegible]; m. Anita Marie Cox, Jan. 12, 1925; children—[illegible], Dwight Peter. Asso. with Dean Witter & Co., Los Angeles, since 1925, partner since [illegible]. Mem. Calif. exec. committee, Investment Bankers Assn. America, 1934, chmn. State of Calif. Legislative Com., 1939, mem. bd. govs., 1939, v.p., [illegible]; mem. Calif. Regional Committee, National Association Securities Dealers, Inc., 1939-40, chmn., 1941, mem. bd. govs., 1942, chmn. 1945. Mem. Kappa Sigma. Clubs: California, Newport Harbor Yacht, Los Angeles Yacht, Bond, Stock Exchange (Los Angeles). Home: [illegible] Chandler Av., San Marino, Cal. Office: [illegible] S. Spring St., Los Angeles 14.

PHILLIPS, Randolph Godfrey, financial exec.; b. N.Y.C., [illegible] 29, [illegible]; s. [illegible] V. Moses and Amy P. Phillips; A.B., [illegible]; m. [illegible] Wilhelm, June 21, [illegible]; children—[illegible], Richard Randolph. Financial writer specializing r.r. finance, N.Y. Herald Tribune, 1931-35, N.Y. World Telegram, [illegible]; [illegible] cons. U.S. Senate Com. on Interstate Commerce, [illegible] [illegible] Office: [illegible] E. [illegible] St., N.Y.C. 21.

PHILLIPS, Ray Edmund, [illegible] library; b. [illegible] [illegible]

PHILLIPS, Richard [illegible], naval officer; b. [illegible] [illegible] Home: [illegible] Army Navy Dr., Arlington, Va. Office: care Bur. of Naval Personnel, Navy Dept., Washington 25.

PHILLIPS, Richard Idler, fgn. service officer; b. Artesia, N.M., Apr. 2, 1911; s. [illegible] P. and Florence (Idler) P.; student U. Neb., [illegible]; A.B., U. So. Cal., [illegible]; LL.B., [illegible]; m. Irene [illegible], Feb. 7, [illegible]. Admitted to Cal. bar, [illegible]; practiced in Los Angeles, [illegible]; [illegible] Buenos Aires, Argentina, [illegible] Montevideo, [illegible] Caracas, Venezuela, [illegible] Guadalajara, Mexico, [illegible] Home: [illegible] Wisconsin Av., Washington 16. Office: Dept. of State, Washington 25.

PHILLIPS, Roger Sherman, publisher; b. Butler, Pa., Oct. 27, [illegible]; s. Thomas W. and Alice (Sherman) P.; grad. Phillips Acad., [illegible]; student Yale, [illegible] [illegible] Office: P.O. Box 11, Rowayton, Conn.

PHILLIPS, Rowley Wilhelm, financial exec.; b. [illegible] [illegible] Office: [illegible] E. [illegible] St., N.Y.C.

PHILLIPS, [illegible] Scherer (Mrs. Robert J. Phillips), civic worker; b. [illegible] [illegible]

PHILLIPS, Theodore, foods corp. exec.; b. [illegible] [illegible] Office: [illegible] Co., Cambridge, Md.

PHILLIPS, Thomas Raphael, army officer, ret.; b. [illegible] Falls, Wis., [illegible] 27, [illegible] [illegible] Author: [illegible] The Art of War by Sun Tzu, [illegible]; The Military Instructions of the Romans, by Vegetius, [illegible]; Editor and Translator: My Reveries on the Art of War, by Marshal de Saxe, [illegible]; The Instruction of Frederick the Great for his Generals, [illegible]. Contbr. to [illegible] periodicals since [illegible], also to [illegible], and to U.S. and fgn. periodicals. Home: [illegible] Connecticut Av., Chevy Chase 15, Md. Office: [illegible] Connecticut Av., Washington 6.

PHILLIPS, Mrs. Tully Marshall, see Fairfax, Marion.

PHILLIPS, Velma, coll. dean; b. Knox County, Ill., Oct. 28, [illegible]; d. William T. and Sarah Dell [illegible] [illegible] dean, Coll. of Home Economics, Washington State Univ., Pullman, Wash., [illegible]— [illegible] Home: [illegible] Columbia St., Pullman, Wash.

PHILLIPS, Waite, industrialist; b. Conway, Ia., Jan. 19, [illegible]; s. Lewis F. and Lucinda J. [illegible] [illegible] brothers Frank and L. E. in oil business at Bartles-

3793

~~EXHIBIT "B"~~

Re: Allegnany v. Kirby

DATES OF DEPOSITIONS AND COURT APPEARANCES

Depositions

1960

~~Oct 27, 28, 29~~
Nov 8, 9, ~~10~~, ~~16~~, 17, ~~18~~, ~~21~~, 22, ~~23~~, 30
Dec 2, 5, 6, 7, 14, 19

1961

Jan 4, 5, 11, 13, 19 20, 25, 26
Feb 2, 3, ~~4~~, ~~7~~, [illegible], 14, 15, 16, 17, 21, 23, 28
Mar 1, ~~7, 8, 9, [illegible], 13~~, 14, 15, 16, 17, 21, 22, 23, 24, 28, 29, 30
Apr ~~3~~, 4, 5, 6, 7, ~~10~~, 11, 12, 13, 14, 17, 18
May 17, 18, 23, 24, 25
June 7, 8, 13, ~~26~~, ~~27~~
July 5, 6, 10, 11, 12, 13, 14, 17, 18, 19
Sept 12, 13, 18, 19, 25, 26. 27
Oct 9, 10, 11, 17, 19, 24, 25, 26, 27
Nov 8, 9, 10, 15, 16, 22, 27, 28, 29, 30
Dec 5, 6, 7, 8, 12, 13, 14, 20

1962

Jan 3, 4, 5
Feb 14, 16, 19, 20, 21, 23, 27, 28
Mar 1, 2. 6, 7, 8, 9, 20, 21, 22, 23, 28, 29
Apr 4, 5, 6, 9, 11, 13, 16, 17
May 1, 2, 3, 4, 9, 10, 11, 16, 17, 18, 22, 25
June 8, 13, 14, 20, 21, 22
July 9
Oct 2, 16, 18, 19, 23
~~Nov 6~~
Dec 18, 19, 20, 26, 27, 28

1963

Jan 2, ~~5~~, ~~7~~, 8, 10, 11, 29
Feb 4, 5, 6, 7, 8, 11, 12, 13, 14, ~~15~~, ~~18~~, 25, 26
Mar 1, 5, 12, 13

Court Appearances*

Oct 4, 28
Nov 15, 16, 23, 28
Dec 13, 14, 15, 16, 20, 30
Jan 3, 7, 10, 19, 24, 25, 30, 31
Feb 1, 2, 7, 8, 9, 10, 24
Apr 10, 18
May 22, 26
June 27
July 10, 12
Sept 8
Nov 15
Mar 30
June 7, 19, 25, 29
Nov 30
Dec 14
Jan 8, 15
Feb 27
Mar 25
Apr 1, 2, 3, 4, 5, 8, 9, 10. 11, 12, 15, 16, 17, 18, 19
May 28

* Includes in chambers.

Dec. 15 .62
1963 = 15

60 Civil 3511

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YOR

ALLEGHANY CORPORATION,

Plaintiff,

-against-

ALLAN P. KIRBY, et al.,

Defendants.

APPLICATION OF
RANDOLPH PHILLIPS
FOR INDEMNIFICATION
OF EXPENSES

Randolph Phillips, Pro Se
30 East 72nd Street
New York 21, N. Y.

Re 4-6776
T-6244

Oct. 13th 1964

This motion is withdrawn by stipulation. So Ordered

Irving Ben Cooper
US DJ

U. S. DISTRICT COURT
FILED
OCT 14 1964
S. D. OF N. Y.

AFFIDAVIT OF SER

STATE OF NEW YORK)
CITY OF NEW YORK) ss.:

RANDOLPH PHILLIPS, being duly affirmed, hereby deposes and says: that on September 24, 1964 I served a copy of the enclosed Notice of Motion, Application and Affidavit upon Townley, Updike, Carter & Rodgers, attorneys for plaintiff herein, and upon Donovan, Leisure, Newton & Irvine, by mailing them with first class postage attached to said attorneys at their offices of record herein; and that prior thereto I supplied each of said attorneys with a copy of my memorandum in support of said application.

RANDOLPH PHILLIPS

Affirmed to before me this
30 day of September, 1964.

William Klass

WILLIAM KLASS
Notary Public, State of New York
No. 41-7287(?) Queens County
Certificate filed in New York County
Term Expires March 30, 1966

MICROFILM
OCT 14 1964

3746

U. S. DISTRICT COURT
FILED
DEC 11 1972
S. D. OF N. Y.

Endorsement

RANDOLPH PHILLIPS, Plaintiff, v. ALLEGHANY CORPORATION and INVESTORS DIVERSIFIED SERVICES, INC., Defendants. 72 Civ. 1544 Pro Se

Plaintiff, appearing pro se, by notice dated October 5, 1972, seeks to reargue a decision made September 25, 1972, which dismissed his complaint as to Alleghany Corporation for failure to plead a recognized statutory basis for subject matter jurisdiction over Alleghany as required by Rule 8(a)(1), F.R.Civ.P.

Reargument is granted. On reargument plaintiff asserts that subject matter jurisdiction exists because the claim is for indemnification, as to "costs", arising out of prior litigation in this Court. Plaintiff was a defendant in a case, Alleghany Corporation v. Kirby, et al., 60 Civ. 3511, which was once pending in this Court. He seeks here to recover some $94,950.00 plus interest.

The 1960 case was tried, and a final judgment entered on June 5, 1963. It is a closed case. See 218 F.Supp. 164, 333 F.2d 327; en banc 340 F.2d 311, 384 U.S. 28 (1966).

As a successful defendant therein, plaintiff here claims he has substantive rights, under Alleghany corporate by-laws, and New York and Maryland statutes, to recover legal fees as costs.

Possibly the Court in Alleghany Corporation v. Kirby, 60 Civ. 3511, could have adjudicated these rights as an incidental aspect of that case, in which subject matter jurisdiction did exist, and might have done so under some theory of pendent jurisdiction, or ancillary power. But it did not do so.

Plaintiff now asks us (Memorandum of Oct. 5, 1972, p. 3) to "... regard the Complaint herein as filed also in ... 60 Civ. 3511, since Maryland law provides for filing [of the claim for "costs" of a successful defendant] in the original action or by independent action."

There is no authority or basis for doing so. The 1960 litigation is a closed case, by entry of a final judgment affirmed on appeal, and by the passage of time. Whether it was a closed case on October 13, 1964, when Phillips withdrew by Stipulation, the claim he had asserted by motion in that action for the same relief here sought, is not of consequence. So stipulating, "without prejudice" simply means that the withdrawal is not an abandonment of the claim. Such stipulation in that action is not sufficient to confer jurisdiction here.

Jurisdiction is statutory. As Plaintiff does not and apparently cannot bring his claim against Allegheny within any recognized statutory basis, his complaint must be dismissed.

On reargument, for the reasons therein, and hereinbefore stated, the prior determination of the Court is adhered to.

So Ordered.

Dated: New York, New York
December 11, 1972

Charles L. Brieant Jr.
CHARLES L. BRIEANT, JR.
U. S. D. J.

116a

59.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

RANDOLPH PHILLIPS,

Plaintiff, :

-against- : 72 Civ. 1544 (CHT)

INVESTORS DIVERSIFIED SERVICES, :
INC. and ALLEGHANY CORPORATION, : NOTICE OF MOTION

Defendants. :

- X

PLEASE TAKE NOTICE THAT, upon the summons and complaint herein, the annexed affidavit of Richard L. Bond, sworn to on June 21, 1974, and the exhibits annexed thereto, and upon all prio proceedings herein, the undersigned will move this Court at a Civil Motion Part thereof, to be held on the 27th day of June, 1974, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, in Room 2804 of the United States Courthouse, Foley Square, New York, New York, pursuant to the order of this Court entered on June 14, 1974, Rules 8(a), 10(b), 12(e) and 26(c) of the Federal Rules of Civil Procedure and the equitable power of the Court, for an order:

(a) Directing plaintiff to replead, and in such amended pleading to: (i) eliminate allegations relating to claims alleged only against defendant Alleghany Corporation ("Alleghany"), (ii) state each claim against defendant Investors Diversified Services Inc. ("IDS") in a short and plain statement showing that plaintiff is entitled to relief against IDS, and (iii) state each claim against defendant IDS which is founded upon a separate transactio or occurrence more definitely in separate counts;

(b) Staying plaintiff from initiating or conducting any pre-trial discovery herein until ten days after the later of: (i) an order determining any motion to dismiss directed to plaintiff's amended complaint, (ii) the receipt by counsel for IDS of a transcript of pre-trial deposition of plaintiff in this action, and an order determining any motion by IDS for summary judgment which is made within twenty days after receipt of the aforesaid transcript, and (iii) payment by plaintiff to defendant Alleghany of such costs and attorneys' fees as may be ordered to be paid in connection with the vacating by Alleghany of an improper default judgment herein; and

(c) For such other and further relief as the Court may deem just and proper.

Yours, etc.

MARSHALL, BRATTER, GREENE,
ALLISON & TUCKER

By________________________
A Member of the Firm
Attorneys for Defendants
Alleghany Corporation
Investors Diversified Services,
Inc.
Office & P.O. Address
430 Park Avenue
New York, New York 10022
Tel. (212) 421-7200

Dated: New York, New York
June 21, 1974

TO:

RANDOLPH PHILLIPS
Plaintiff Pro Se
30 East 72nd Street
New York, New York 10021

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

RANDOLPH PHILLIPS,	:	
Plaintiff,	:	
-against-	:	72 Civ. 1544 (CHT)
INVESTORS DIVERSIFIED SERVICES, INC. and ALLEGHANY CORPORATION,	:	AFFIDAVIT
Defendants.	:	

- x

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

RICHARD L. BOND, being duly sworn, deposes and says:

1. I am a member of the firm of Marshall, Bratter, Greene, Allison & Tucker, attorneys herein for defendants Investors Diversified Services, Inc. ("IDS") and Alleghany Corporation ("Alleghany"), and am fully familiar with the matters set forth below. This affidavit is in support of a motion, pursuant to Rules 8(a), 10(b), 12(e) and 26(c) of the Federal Rules of Civil Procedure and the equitable power of the Court, for an order:

a. directing plaintiff to replead, and in such amended pleading to: (i) eliminate allegations relating to claims alleged only against defendant Alleghany, (ii) state each claim against defendant IDS in a short and plain statement showing that plaintiff is entitled to relief against IDS, and (iii) state each claim against defendant IDS which is founded upon a separate transaction or occurrence more definitely in separate counts;

b. staying plaintiff from initiating or conducting any pre-trial discovery herein until ten days after the later of:

(i) an order determining any motion to dismiss directed to plaintiff's amended complaint, (ii) the receipt by counsel for IDS of a transcript of pre-trial deposition of plaintiff in this action, and an order determining any motion by IDS for summary judgment which is made within twenty days after receipt of the aforesaid transcript, and (iii) payment by plaintiff to defendant Alleghany of such costs and attorneys' fees as may be ordered to be paid in connection with the vacating by Alleghany of an improper default judgment herein.

NATURE OF THE ACTION

2. This action was commenced on April 20, 1972. Alleghany was served on April 20, 1972, and IDS was served on or about May 19, 1972. Plaintiff Randolph Phillips ("Phillips"), is not a member of the bar and is appearing pro se in this action.

3 Plaintiff's complaint, which is Exhibit A hereto, seeks from Alleghany and/or IDS "$94,950.00 plus 6% interest compounded annually from October 13, 1964, to date". The supposed claim or claims arise from Phillips' alleged right to "indemnification and reimbursement" of his "reasonable expenses necessarily incurred in connection with his successful defense" of himself in a derivative action entitled Murchison, et al. v. Kirby, et al. (S.D.N.Y. 60 Civ. 3511), which was concluded as to Phillips in 1963, but not as to other defendants until some years thereafter. Phillips allegedly was sued in that action, in which IDS was not a party, "in his role as director" of IDS and "as a fiduciary for the common stockholders" of both Alleghany and IDS. He further contends that in 1964 he withdrew an application made in the prior litigation in reliance upon an oral "understanding and agreement" with Alleghany's officers and attorneys that, "if I would with-

draw the application to this Court, Alleghany Corporation and if not Alleghany Corporation, then IDS, would pay me the aforesaid requested sum after the final determination of the litigation then pending".

RELEVANT PRIOR PROCEEDINGS

4. The unusual and complex prior history of this action is of considerable importance with respect to the instant motion and graphically shows the compelling need for the relief now sought by defendants.

5. Prior proceedings have not touched upon the merits of Phillips' purported claim. Rather, they have concentrated primarily upon Phillips' efforts to enforce a default judgment against Alleghany in the sum of $137,696.82, which was improperly entered under circumstances where this Court has held that no default should ever have been obtained. The sequence in the District Court as to the default judgment has been as follows:

a. On May 10, 1972, the twentieth day after service upon Alleghany, it timely obtained an order from District Judge Morris E. Lasker extending until June 2 its time to move with respect to or answer the complaint.

b. Despite Alleghany's prior appearance and extension of time, on May 12, 1972, Phillips somehow obtained entry by the Clerk of the District Court of a Judgment by Default against Alleghany.

c. After Phillips refused voluntarily to vacate the default, Alleghany moved by order to show cause on May 15, 1972, to set aside the default judgment. This motion, originally returnable on May 18, was adjourned repeatedly in response to various entreaties by Phillips to Judge Frankel. Faced with potential loss of its right to appeal from the default judgment, 28 U.S.C. §2107, Alleghany filed a protective notice of appeal on June 8, 1972.

d. By opinion and order of Judge Marvin E. Frankel, dated June 15, 1972 (Exhibit B hereto), the default judgment against Alleghany was set aside.

e. On June 16, 1972, Phillips moved for reargument, primarily based upon Judge Frankel's supposed "fraud" in not revealing that he had opposed Phillips in unrelated litigation when in private practice some 14 years earlier. On July 3, 1972, Judge Frankel denied reargument (Exhibit C hereto).

f. On July 7, 1972, Alleghany moved in the District Court, pursuant to Rule 42(a) of the Federal Rules of Appellate Procedure, to dismiss its appeal from the default judgment. The motion was returnable on July 18th, was not opposed by Phillips, and was granted by memorandum order dated July 20, and entered July 21, 1972.

g. On or about July 18, 1972, Phillips filed a notice of appeal from Judge Frankel's June 15, 1972 order vacating the default judgment and July 3, 1972 order denying reargument.

h. On or about August 10, 1972, Phillips filed a notice of appeal from Judge Brieant's order of July 20, 1972, which granted Alleghany's Rule 42(a) motion to dismiss its appeal from the default judgment.

6. Other relevant proceedings in the District Court relate to motions by Alleghany and by IDS to dismiss for lack of subject matter jurisdiction. Alleghany's motion was made on June 27, 1972 and was granted by Judge Brieant on September 25, 1972. A similar motion by IDS was made on June 8, was submitted to Judge

Gurfein on June 20, and was not opposed by Phillips; although a proposed order disposing of that motion was served and filed on June 21, 1972, no action was taken thereon and the IDS motion remains pending.

7. It also should be noted that Alleghany noticed Phillips' deposition for June 27, 1972, and timely requested production of documents for use in connection with the deposition. Phillips "rejected" these discovery efforts by a notice served on June 27, 1972.

8. In the Court of Appeals, Phillips sought, inter alia, to compel the District Court to permit enforcement of his alleged default judgment against Alleghany, which was denied by order of Judge Timbers on August 9, 1972, and Phillips' motion for reconsideration was denied on August 24, 1972. His remaining appeals were dismissed sua sponte on May 27, 1974, by the Court of Appeals for failure to prosecute.

9. Finally, we come to the most recent proceedings which precipitated the instant motion. On June 7, 1974, Phillips noticed the deposition of IDS by Mr. Fred M. Kirby, Chairman of the Board, to be held on June 17. After Phillips refused to adjourn that deposition, IDS obtained an order to show cause on June 14, 1974, which stayed Mr. Kirby's deposition pending determination of the instant motion.

10. Thus, the present status of this action is as follows:

a. Defendant Alleghany has been dismissed from the action, but it still has pending an undecided application - which was invited by Judge Frankel - for costs and attorneys' fees incurred in vacating the default judgment improperly entered against it in 1972. An affidavit and memorandum in support of

Alleghany's application were transmitted to the Court on or about June 30, 1972.

b. Defendant IDS has pending a motion to dismiss for lack of diversity jurisdiction, which was granted orally by Judge Gurfein on July 20, 1972, but never disposed of by order.

c. Plaintiff has noticed the deposition of IDS, which deposition has been stayed by order of Judge Tenney.

THE INSTANT MOTION

11. Despite the fact that this lawsuit is more than two years old, it still is not at issue, despite extensive proceedings in this Court and in the Court of Appeals. It seems apparent that this state of affairs has directly resulted from conduct in the litigation by Phillips that would not be tolerated from a member of the bar, including repeated attacks upon the integrity of numerous judges and distinguished attorneys. It is the hope of the instant motion to establish controls over the further conduct of the lawsuit, specifically including an orderly determination as to whether the Court has subject matter jurisdiction and whether Phillips' alleged claims are susceptible of an early motion to dismiss or for summary judgment.

12. The complaint in its present form presents a barrier to prompt determination of the threshhold issues of jurisdiction and whether plaintiff has stated or has a claim. The complaint (Exhibit A) names both IDS and Alleghany as defendants, and to a substantial extent seems to treat the two defendants as though they are interchangeable, although - as hereafter shown - their respective relationships to the subject matter plainly are not the same. Now that Alleghany has been dismissed, it seems prudent to require Phillips to excise allegations that only relate

to claims against Alleghany, particularly since plaintiff has demanded a jury trial.

13. Potential jurisdictional issues arise which cannot be effectively determined from the complaint in its present form. The only jurisdictional allegations are found in ¶1, which contains allegations that seem designed to support diversity jurisdiction as between plaintiff and IDS. However, it already has been held that Alleghany was not diverse, and the question now remains as to whether Alleghany is an indispensible party. In this connection, it should be noted that Phillips recently told me that he intends to commence an action against Alleghany in the State Court concerning the same subject matter, raising the undesirable prospect of potentially having essentially the same case proceeding simultaneously in this Court and the State Court. That is a factor bearing upon the indispensability of Alleghany, and thus upon whether the case can proceed in this Court against IDS alone.

14. If Phillips relies upon diversity jurisdiction, there also appears to be a threshhold issue, potentially dispositive of the action in this Court, as to whether there is an amount in controversy sufficient to satisfy 28 U.S.C. §1332(a). If the basis for Phillips' claim against IDS is more clearly delineated, as a matter of law it may fail to state a claim against IDS for reasons suggested below, which also would bear upon whether the amount in controversy is adequate to support diversity jurisdiction.

15. The present complaint essentially consists of a narrative concerning Phillips' pro se defense of himself in derivative liti-

gation for Alleghany commenced in this Court and the State Court in 1960 (Complaint, ¶2). That litigation was finally dismissed as to Phillips on June 5, 1963, but appealed as to other defendants and not finally determined until 1966 (Complaint, ¶¶6, 16). Phillips alleges that in 1964 he filed an application for his "reasonable expenses" incurred in defending himself pro se in that litigation, but withdrew his application after conferring with attorneys for Alleghany, who supposedly agreed that Alleghany, "and if not Alleghany Corporation, then IDS", would pay Phillips the sum he sought after the final determination of the litigation then pending. (Complaint, ¶¶11-15). The complaint concludes that a 1970 refusal to pay Phillips "constitutes a breach of the aforesaid oral contract of October 13, 1964 and of the statutory [indemnification] rights of plaintiff..." (Complaint, ¶19), justifying "judgment against Alleghany Corporation and/or Investors Diversified Services, Inc." (Complaint, Prayer).

16. One can but speculate on the above allegations as to the basis for Phillips' claim against IDS - as distinguished from Alleghany. IDS was not a party to the derivative litigation for which Phillips seeks compensation for his pro se defense "at the rate of $50 per hour" (Complaint, ¶13). As shown by the accompanying memorandum of law, if Phillips' claim against IDS is based upon an oral contract with IDS, there are statute of frauds problems on the face of such a contention, and it is difficult to envision consideration to IDS for such an agreement. If the claim against IDS is based upon statutory indemnification rights, there also are serious legal barriers that may warrant dismissal for failure to state a claim or early summary disposition. Whatever legal theory Phillips may utilize as to IDS, there are public policy questions as to whether he may be paid for his own time in

a pro se defense. However, neither the Court nor IDS should be required to speculate as to the basis for Phillips' claim against IDS. Although the instant motion does not seek decision on these questions, the accompanying memorandum demonstrates that obvious legal barriers may exist to such theories as Phillips seems to be asserting. Given a proper pleading which indicates what Phillips relies upon as to IDS, it would be in everyone's interest to have the sufficiency of Phillips' claim determined at the earliest possible time.

17. Only after service of an appropriate amended complaint can it be determined whether a motion by IDS to dismiss should be made on the face of the pleadings, or whether examination of Phillips will be required to determine whether proper grounds exist for a summary judgment motion. Accordingly, the order sought by this motion seeks stay of discovery by Phillips for a reasonable time to allow for early motions which may terminate the action in this Court.

18. The relief sought by this motion is for defendant IDS, with one exception. On behalf of Alleghany, we seek payment by Phillips of costs and attorneys' fees incurred in vacating the improper default judgment against Alleghany, an application invited by Judge Frankel which remains undecided. Because of Phillips' history of abusive tactics, both in this action and in other litigations, it is urged that disposition of Alleghany's application and payment by Phillips of such sum as the Court may determine should be a prerequisite to permitting Phillips to launch anew a campaign expected to be characterized by harassment and villification. The record speaks for itself:

a. In his opinion vacating Phillips' default judgment

(Exhibit B hereto), Judge Frankel pointed to "the absurdity" which resulted in Phillips' "breathtakingly" obtaining the default judgment; the proceedings to vacate which were "prolonged and exasperating beyond any due measure" by the "tenacious bellicosity and abusiveness of the plaintiff"; Phillips' conduct in "heaping insult upon opposing counsel" and "voluminous and gratuitous attacks upon various state and federal judges"; his frequent use of "baseless and essentially irrelevant charges of fraud"; and the fact that Phillips is an experienced and sophisticated litigant whose "course of invective and relentless imposition upon counsel and the court is both grievous in its impact and less excusable than it might be from people lacking his competence".

b. Undaunted, Phillips then attacked the Court in a motion for reargument, causing Judge Frankel to comment, inter alia, that this Court could not function were judges to disqualify themselves because of charges of the kind made by Phillips in placing Judge Frankel in "the roster of judges and others charged with fraud by this plaintiff" (Exhibit C).

c. Phillips' papers in the Court of Appeals were replete with attacks upon Judge Frankel, Judge Friendly, Judge Timbers, and others. This is a familiar technique to Phillips, as pointed out by Judge Kaufman more than ten years ago in Ackert v. Bryan (Opinion, dated June 21, 1963, 2d Cir., annexed as Exhibit D hereto):

> "He hurls thoroughly unsubstantiated charges at reputable counsel, contending that they fraudulently and corruptly entered into a settlement agreement in a companion case in the New York courts which, had this been known to our Court, would have necessitated our reaching a different conclusion from that recorded at 299 F.2d 65, rehearing denied, 299 F.2d 72 (1962).

> I am not so much concerned with Mr. Phillips' indignation at what he believes to be improper behavior on the part of counsel. What does concern me is his cavalier and outrageous use of the federal courts--and indeed other forums--for his unrestrained attacks upon the personal veracity and professional competence of counsel. He has entered, quite belatedly, a litigation which was bitterly contested in the first instance and which received thorough and painstaking consideration of a panel of this Court, on original hearing and rehearing as well. He comes before this Court wearing the cloak of a pro se applicant, and seeks to extract from us the solicitude ordinarily afforded one appearing without counsel. But this should not shield him from rebuke when merited. He is an intelligent, able and sophisticated litigant, who is no stranger to this Court, having appeared frequently in his own behalf both in the District Court and the Court of Appeals. We would expect that one possessed of his background would be conscious of the outer limits of forceful advocacy and fully aware when his acts transgress those limits. Moreover, we are not to be manipulated by resourceful but meritless moves in a long-closed litigation, moves which serve only to distract us from important judicial business. This is particularly true when it is noted that Mr. Phillips has not seen fit to raise his voice in the state-court hearing on the propriety of the settlement which he now asks us, in this rather bizarre proceeding, to brand as fraudulently procured."

19. The Court and defendants have been needlessly imposed upon enough in this action as a result of Phillips' conduct. In the interests of a just, speedy and inexpensive determination of this lawsuit, it is urged that Phillips should be compelled to replead, properly stating such claims as he may have against IDS; and that Phillips be stayed from conducting discovery until it

has been determined whether the Court has jurisdiction, whether Phillips has a claim, and until after he has paid Alleghany for the costs and attorneys' fees it incurred as a result of Phillips' prior improper conduct in this action.

RICHARD L. BOND

Sworn to before me this

27th day of June, 1974.

NOTARY PUBLIC

BEVERLY [illegible] COLLIER
Notary Public, State of New York
No. [illegible]
Qualified in New York County
Commission Expires March 30, 1975

29

RP

UNITED STATES DISTRICT COURT
FOR SOUTHERN DISTRICT OF NEW YORK

RANDOLPH PHILLIPS,

Plaintiff,

-against-

INVESTORS DIVERSIFIED SERVICES, INC.,
and ALLEGHANY CORPORATION,

Defendants.

----

72 Civil 1541 (CHT)

AFFIDAVIT

STATE OF NEW YORK)

COUNTY OF NEW YORK) ss.:

RANDOLPH PHILLIPS, being duly affirmed, hereby deposes and says: I am the plaintiff herein appearing pro se and I make this affidavit in opposition to the motion of defendants made herein under date of June 21, 1974 for an order directing plaintiff "to replead" and for other relief. As shown by Exhibits A, B, and C appended hereinafter to this affidavit, this Court lacks jurisdiction to grant defendants' motion since this action has been terminated by final judgment against Alleghany Corporation in favor of plaintiff and Alleghany's appeal therefrom has been dismissed.

1. Appended hereinafter as Exhibit A is a photocopy of Judgment #72,542 entered in this action by the Clerk of the Court on May 12, 1972.

2. At the time of the entry of this Judgment Investors Diversified Services, Inc. was not a party to the action, not having been served with the summons and complaint. On the suggestion of the law clerk to Judge Lasker, who was then sitting in the motion part, the name of Investors Diversified Services, Inc. was struck from the caption and the fact that it had not been served written into the Judgment. Thereupon, John Livingston, Clerk of the Court, entered the Judgment, pursuant to his authority under Rule 55(a)(b)(1), F. R. C. P.

63a

3. Appended hereinafter as Exhibit B is a photocopy of the Notice of Appeal "to the United States Court of Appeals for the Second Circuit from the Judgment By Default entered against Alleghany Corporation in this action on the 12th day of May, 1972" dated June 8, 1972 and filed by Alleghany that day in this Court.

4. Appended hereinafter as Exhibit C is a photocopy of an order of the United States Court of Appeals entered on the 21st day of May, 1974 dismissing the appeal herein. Previously, on July 21, 1972 Judge Brieant entered an order herein dismissing Alleghany's appeal, pursuant to Rule 42(a), Federal Rules of Appellate Procedure. (Affidavit of Richard L. Bond, attorney for defendants, sworn to June 21, 1974, par. f, p. 4).

5. Appended as Exhibit D is a photocopy of the first 6 pages of the Annual Report of Alleghany Corporation for the year 1972. As the former Chairman of the Finance & Law Committee of the Board of Directors of Investors Diversified Services, Inc. and from an examination of its 1972 Annual Report I know that it is incorporated in the State of Minnesota and in 1972 as today maintains its principal office there.

WHEREFORE, this Honorable Court lacks jurisdiction to grant defendants' motion since this action has been terminated by final judgment against Alleghany Corporation in favor of plaintiff and Alleghany's appeal therefrom has been dismissed.

RANDOLPH PHILLIPS

Affirmed to before me this

27th day of June, 1974.

ANNE KLASS
Notary Public, State of New York
No. 41 [illegible]
[illegible]
Certificate filed in New York County
Term Expires March 30, [illegible]

64a

U. S. DISTRICT COURT
FILED
AUG 30 1974
9:30 A.M.
S. D. OF N. Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-----------------------------------x
RANDOLPH PHILLIPS, :
Plaintiff, : 72 Civ. 1544 (CHT)
-against- :
INVESTORS DIVERSIFIED SERVICES, :
INC. and ALLEGHANY CORPORATION,
:
Defendants.
-----------------------------------x

MICROFILM
AUG 30 1974

MEMORANDUM

#41128

TENNEY, J.

On June 14, 1974, this Court granted the motion of defendant Investors Diversified Services, Inc. ("IDS"), brought on by an order to show cause, to stay the deposition of its Chairman of the Board of Directors, Fred M. Kirby, and to be permitted to submit a motion in substitution for a motion, now pending, made pursuant to Fed. R. Civ. P. 12(b). IDS now seeks an order, pursuant to Fed. R. Civ. P. 8(a), 10(b) and 12(e), directing plaintiff to revise his complaint and, pursuant to Fed. R. Civ. P. 26(c), staying plaintiff from initiating or conducting any pretrial discovery pending resolution of certain matters. Plaintiff, appearing *pro se*, has moved to vacate certain orders entered in 1972. For the reasons cited *infra*, defendant's motion is granted in part and denied in part and plaintiff's cross-motion is denied.

Before turning to the instant motions, the Court wishes to give a summary of the history of this action. The action was commenced on April 20, 1972 against Alleghany Corporation ("Alleghany") and IDS. Alleghany was served on that date and IDS was served one month later, on May 19. The complaint alleges that defendants are jointly and severally liable to plaintiff in the amount of $94,950.00 plus interest, the "reasonable expenses necessarily incurred in connection with his successful defense" of himself in a derivative action entitled Murchison, et al. v. Kirby, et al., 60 Civ. 3511 (S.D.N.Y.). The merits of the instant action have never been reached. Instead, various judges sitting on the District Court for the Southern District of New York, as well as the Court of Appeals, have been engaged in various procedural and jurisdictional problems.

Some of these problems have arisen as a result of a default judgment entered against Alleghany. It appears that, on May 10, 1972, the twentieth day after service upon Alleghany, Alleghany obtained an ex parte order from Judge Morris E. Lasker extending until June 2, 1972 its time to answer or move with respect to the complaint. Owing to problems in notifying plaintiff of the entry of this order, plaintiff assumed that Alleghany had defaulted. He thereupon proceeded to procure a "judgment of default" against Alleghany. After learning of the May 20 order, plaintiff refused to vacate the default judgment. Consequently, Alleghany moved in the district court to set it aside. Fearing that it might lose its right to appeal from the default judgment --its motion to set aside the judgment having been repeatedly adjourned at plaintiff's request--Alleghany filed a notice of appeal on June 8, 1972. On Junt 15, 1972, however, Judge Marvin E. Frankel granted Alleghany's motion to set aside the default judgment. He also directed Alleghany to file papers detailing its claim for costs and attorney's fees in vacating the default judgment. (Alleghany has submitted those papers but its claim remains undecided.) Phillips, unhappy with Judge Frankel's decision, moved to reargue the motion. Judge Frankel, in an order entered July 3, 1972, denied the motion and adhered to his previous decision. Alleghany, having obtained the relief it sought, then moved to dismiss its appeal and its motion was granted on July 20, 1972, Phillips having entered no opposition. At approximately the same time, however, Phillips filed his own notice of appeal, seeking reversal of Judge Frankel's June 15 and July 3 decisions.

The second reason why the merits of this action have never been determined is that Phillips and Alleghany have been engaged in a battle over jurisdiction. Plaintiff, a citizen of New York, had predicated jurisdiction of his claim upon 28 U.S.C. § 1332. Once the default judgment against it had been set aside, Alleghany moved to dismiss the action on the ground that "complete diversity" was absent: Alleghany's principal place of business was in New York. IDS similarly moved to dismiss the action on that ground. On September 25, 1972, Judge Charles Bricant granted Alleghany's motion to dismiss. IDS' motion, which had been submitted to Judge Murray I. Gurfein, was never decided and is still pending.

Phillips thereafter filed a notice of appeal from Judge Brieant's order.

The appeal which sought reversal of Judge Frankel's order setting aside the default judgment was dismissed by Judge William H. Timbers of the Court of Appeals, Second Circuit, on August 9, 1972 and Phillips' motion for reconsideration of the dismissal was denied on August 24, 1972. (Although it is not clear from the papers presently before the Court, the appeal was probably dismissed on the ground that there was "no final decision". 28 U.S.C. § 1291.) The appeal which sought reversal of Judge Brieant's order dismissing the action as against Alleghany was dismissed on May 27, 1974 for failure to prosecute. § 0.18, Rules of the United States Court of Appeals for the Second Circuit.

Thus, the status of the present action is as follows: (1) Alleghany has been dismissed from the action but its application for costs and attorney's fees is still pending; (2) IDS' motion to dismiss for lack of subject matter jurisdiction is still pending; (3) plaintiff's notice of deposition, directed to IDS' Board Chairman, has been stayed pending resolution of the motions presently before the Court.

Although the delays in this case are partly due to plaintiff's conduct in prosecuting his claim, it would be wrong to place all of the blame upon him. The summary of facts shows that the system which preceded the institution of the individual assignment system is in large part responsible for the delay and confusion: each judge who has ruled in this case was in a disadvantageous position--acting in a vacuum and unable to look at the action as a whole. Hopefully, the confusion that resulted from the inherent delays of that system can now be remedied by this Court, which has control of this case for all purposes.

For reasons of convenience, the Court will first consider plaintiff's cross-motion. Plaintiff seeks to vacate the orders entered June 15, 1972 (setting aside the default judgment) and September 25, 1972 (granting Alleghany's motion to dismiss). Plaintiff also requests the Court, in the event it does not vacate the order of September 25, 1972, to find that this Court has jurisdiction over Alleghany under principles of "incidental" or "ancillary jurisdiction". The Court has carefully examined all of plaintiff's papers and has concluded that this cross-motion is merely an attempt to reargue that which has already been decided. Plaintiff has asserted no new grounds for finding: (1) that Judge Frankel had no jurisdiction to vacate the judgment of default; (2) that Judge Frankel was wrong in setting aside the default judgment; (3) that Judge Brieant was wrong in dismissing the action against Alleghany for lack of subject matter jurisdiction; or that (4) Judge Brieant had no jurisdiction to hear Alleghany's motion. Because the Court can find no error of law, the applicable law has not changed since those orders were entered and plaintiff has not brought to the attention of the Court any facts not available to Judges Frankel and Brieant, the Court will consider those orders and all issues necessarily decided, as the "law of the case". 1B Moore's Federal Practice ¶ 0.404. That is not to say, of course, that plaintiff is forever precluded from raising those issues. If and when a final decision is rendered in this action, he will be able to appeal those matters. The Court would note that if plaintiff is as anxious as he claims in pursuing this action to final disposition within the foreseeable future, he should be able to understand that the rehashing of issues previously argued and briefed must come to end and that the parties must move on to the merits as rapidly as possible.

The Court will now turn its attention to that portion of IDS' motion which is directed to the complaint. It should be remembered, in this regard, that IDS' motion to dismiss the action for lack of subject matter jurisdiction, Fed. R. Civ. P. 12(b)(1), is still pending. Although plaintiff believes that the jurisdictional question is now moot, owing to the dismissal of Alleghany, it is not at all clear to the Court at this time that dismissal of the non-diverse party--Alleghany--has cured the jurisdictional problem.

In any event, IDS apparently wishes to urge dismissal on additional grounds: (1) failure to state a claim upon which relief can be granted; (2) failure to join a party (Alleghany) under Fed. R. Civ. P. 19; and (3) lack of jurisdiction over the subject matter (this time, for failure to meet the jurisdictional amount set forth in 28 U.S.C. § 1332). It claims that the complaint as now drafted prevents it from determining at this time whether it should urge dismissal on those grounds. Thus, IDS claims, the complaint is defective in that allegations directed against IDS are interspersed with allegations directed against Alleghany; IDS and Alleghany are often treated as interchangeable; claims based on contract law are intermingled with claims based on statutory law.

The Court, however, has read the complaint and finds that, although it is inartistically drafted, it is not "so vague or ambiguous that [IDS] cannot reasonably be required to frame a responsive pleading...." Fed. R. Civ. P. 12(e). The complaint states in narrative form those facts (including names, times and places) which plaintiff believes give him the right to indemnification and reimbursement under principles of contract law (based upon the oral statements described in ¶¶ 12-15 of the Complaint) and under statutory law (id., ¶¶ 8-11). Plaintiff believes that IDS is liable to him based upon written and oral promises allegedly made by the firm of Donovan, Leisure, Newton & Irvine, which firm plaintiff claims was speaking on behalf of IDS, and upon the fact that plaintiff alleges he was, at one time, a director of IDS.

The detail of defendant's moving papers demonstrates that IDS has sufficient notice of the facts upon which plaintiff bases his claim, whether meritorious or not, to respond to it. While a refined complaint might be desirable, the Court is of the opinion that--based upon its examination of plaintiff's papers--an amended complaint would be no more illuminating and would only cause additional delay. In denying this portion of defendant's motion, however, the Court notes that IDS may, if it chooses, make an application to amend its original motion to add the three grounds mentioned above. 2A Moore's Federal Practice ¶ 12.23 at 2454 et seq. At this time, however, the Court cannot permit such an amendment: it is not clear why these grounds were not raised in the original motion and plaintiff has not had an opportunity to oppose amendment.

Finally, the Court turns its attention to that portion of IDS' motion which is directed to the question of plaintiff's discovery. IDS has asked that plaintiff be stayed from conducting further discovery until the later of: (1) an order determining any motion to dismiss directed to plaintiff's complaint; (2) an order determining a motion by IDS for summary judgment (in the event that IDS decides to move under Fed. R. Civ. P. 56 after deposing plaintiff); or (3) payment of such costs and attorney's fees as the Court determines were reasonably incurred by Alleghany in vacating the default judgment entered against it in 1972.

Plaintiff has not indicated how he would be prejudiced by entry of a stay. The Court believes, however, that entry of a stay until such time as the Court determines any IDS motion directed to the merits based upon matters outside the pleadings (whether it be made pursuant to Fed. R. Civ. P. 12 or 56) is too drastic a remedy--at least for the moment--and is unfair since defendant apparently intends to conduct its own discovery if the action is not dismissed for jurisdictional reasons or for defects on the face of the complaint. The Court appreciates the difficulties defendant has had in dealing with plaintiff in the past. Nevertheless, the result of defendant's motion, if granted, would be to prevent plaintiff from attempting to discover information now under IDS' control which might be used in support of his claim. That is simply not justified. Moreover, the Court does not believe that plaintiff should be stayed from conducting discovery until he pays whatever fees and attorney's fees the Court determines are reasonably owing to Alleghany. Although Alleghany is entitled to an early determination of its claim, the determination is merely incidental to the action and can be made separately.

Accordingly, (1) IDS' motion, insofar as it seeks an order directing plaintiff to amend his complaint, is denied; (2) IDS' motion, insofar as it seeks an order staying plaintiff from initiating or conducting any pre-trial discovery, including the deposition of Mr. Kirby which is now pending, is granted, the stay to remain in effect until ten days after the determination of any IDS motion to dismiss for lack of subject matter jurisdiction or for any reason not based upon matters outside the pleadings; (3) plaintiff's cross-motion is denied; (4) IDS is directed, within twenty days of entry of this order (a) to move to amend its motion to dismiss, now pending, (b) to renew its motion to dismiss, now pending, or (c) to move for summary judgment; (5) Alleghany, or IDS on behalf of Alleghany, is directed to renew the motion for costs and attorney's fees incurred by Alleghany in vacating the default judgment erroneously entered against it.

So ordered.

Dated: New York, New York
August 28, 1974

U.S.D.J.

67

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---x

RANDOLPH PHILLIPS,	:	72 Civ. 1544 (CHT)
Plaintiff,	:	
-against-	:	AFFIDAVIT
INVESTORS DIVERSIFIED SERVICES, INC. and ALLEGHANY CORPORATION,	:	
	:	
Defendants.	:	

---x

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

MICHAEL H. GRAHAM, being duly sworn, deposes and says:

1. I am associated with the firm of Marshall, Bratter, Greene, Allison & Tucker, attorneys for defendants Investors Diversified Services, Inc. ("IDS") and Alleghany Corporation ("Alleghany"), and am fully familiar with the matters set forth below.

2. This affidavit is submitted in opposition to a motion by plaintiff Randolph Phillips ("Phillips"), denominated a "Notice of Cross-Motion Under Rules 60(b)(4) and 54(b), Federal Rules of Civil Procedure." This affidavit also is submitted in support of defendants' pending motion pursuant to Rules 8(a), 10(b), 12(e) and 26(c) of the Federal Rules of Civil Procedure.

3. On July 8, 1974, Alleghany was served by Phillips with the aforementioned Notice of Cross-Motion together with an accompanying Memorandum of Law. Since the Federal Rules of Civil Procedure contain no provision for cross-motions and, in light of the fact that Phillips' answering papers to defendants' motion, now sub judice, were served by plaintiff on June 27,

1974, after defendants' aforementioned motion was fully submitted, we requested the Court's direction on how it wished to treat Phillips' "cross-motion". The Court advised that Phillips' motion would be treated together with defendants' pending motion and that defendants' answering papers be served on or before July 18, 1974, which date subsequently was extended by Court direction to July 19, 1974.

4. Plaintiff's instant motion seeks an order, pursuant to Rules 60(b)(4) and 54(b) of the Federal Rules of Civil Procedure, vacating as "null" and "void" the order of Judge Frankel, entered on June 15, 1972, setting aside plaintiff's improperly obtained default judgment against Alleghany entered on May 12, 1972 in the sum of $137,697.82.

5. Phillips, in support of his motion, argues in substance that Judge Frankel lacked subject matter jurisdiction to enter the June 15th order vacating the default judgment by reason of the fact that on June 8, 1972, Alleghany filed a Notice of Appeal from said default judgment.

6. This is not the first time that Phillips has raised the argument that the District Court lacked jurisdiction to vacate the default judgment. After Judge Frankel rendered his Memorandum Opinion of June 15, 1972, Phillips on June 16th moved for re-argument, allegedly pursuant to Rule 9(m) of the General Rules of this Court. In support of his motion for re-argument, Phillips initially relied primarily upon Judge Frankel's "supposed fraud" in not revealing that he opposed Phillips in unrelated litigation when Judge Frankel was in private practice some 14 years earlier. Shortly thereafter, by letter of June 27, 1972, and by an "Application for an Order by this Court Directing Plaintiff to File Appended Affidavit Pursuant to

Rule 9(m) of the General Rules of this Court", with supporting affidavit (copies of which are annexed hereto as Exhibits A and B respectively), plaintiff asserted to Judge Frankel that the Court lacked jurisdiction to enter its order of June 15, 1972, by reason of Alleghany's Notice of Appeal filed on June 8, 1972.

7. Upon receipt of Phillips' June 27, 1972 letter, Alleghany submitted a letter dated June 30, 1972, addressed to Judge Frankel, responding to Phillips' contention that the Court lacked jurisdiction to enter its order of June 15th vacating the judgment by default entered on May 12, 1972 against Alleghany. A copy of Alleghany's June 30, 1972 letter is annexed as Exhibit C. Under date of July 3, 1972, Judge Frankel denied plaintiff's motion for re-argument, sub silentio denying plaintiff's contention of the Court's lack of jurisdiction. A copy of Judge Frankel's July 3rd Memorandum Opinion is annexed as Exhibit D.

8. As stated in the affidavit of Richard L. Bond, dated June 21, 1974, submitted in support of defendants' motion now sub judice before Judge Tenney, on July 18, 1972, Phillips filed a Notice of Appeal from both Judge Frankel's Order of June 15, 1972 vacating the default judgment and from his Order of July 3, 1972, denying re-argument. In the Court of Appeals, Phillips sought by motion, inter alia, to compel the District Court to permit enforcement of his alleged default judgment against Alleghany through an order directing ". . . the Clerk of the District Court and the United States Marshall to take all steps necessary forthwith to execute or otherwise enforce. . ." the alleged default judgment. In his affirmation in support of Phillips' motion in the Circuit Court "to dismiss appeal

for failure of defendant-Appellant Alleghany Corporation to comply with Rules 8, 10 & 12 of the Federal Rules of Appellate Procedure,''etc., Phillips specifically asserted, inter alia, that:

> "6. . . . In the interim said defendant [Alleghany] obtained from the District Court per Frankel, D. J. a 'MEMORANDUM' Opinion and Order dated June 15, 1972 granting a 'motion to vacate the default' (See Exhibit A appended hereinafter), notwithstanding the fact as shown by the above cited authorities it was without jurisdiction to do so." (emphasis in original)

Phillips' motion was denied in all respects by order of Judge Timbers on August 9, 1972. Phillips' motion for re-consideration was denied on August 24, 1972, and his appeals were dismissed, sua sponte by the Court of Appeals on May 27, 1974, for failure to prosecute.

9. Thus, Phillips' contention that Judge Frankel lacked subject matter jurisdiction to enter his order of June 15, 1972 vacating the default judgment against Alleghany by reason of Alleghany having filed a Notice of Appeal on June 8, 1972, has been fully briefed and decided in Alleghany's favor both by the District Court and upon appeal by the Court of Appeals.

10. By reason of the foregoing, Phillips' renewed attempt to raise the same question for the third time, which has been rejected by both the District Court and the Court of Appeals, should not be countenanced.

11. It also is pertinent to point out that Alleghany moved in the District Court, pursuant to Rule 42(a) of the Federal Rules of Appellate Procedure, to dismiss its appeal from the default judgment, which motion, not opposed by Phillips, was granted by order of Judge Bricant, entered July 21, 1972.

12. Moreover, if the Court for some reason decides to entertain Phillips' "cross-motion", despite prior judicial rejection of Phillips' contention and despite the support for Judge Frankel's action contained in Alleghany's June 30, 1972 letter (Exhibit C), defendant respectfully requests that the Court treat this affidavit as a reassertion of Alleghany's motion pursuant to Rules 55(c) and 60(b) of the Federal Rules of Civil Procedure to vacate the default judgment, together with the request that execution on the default judgment be stayed pending consideration of Alleghany's Rule 55(c) and Rule 60(b) motion to vacate the default.

Michael H. Graham

Sworn to before me this
19th day of July, 1974

Beverly Sue Collier
Notary Public

BEVERLY SUE COLLIER
Notary Public, State of New York
No. 31-0[illegible]
Qualified in New York County
Commission Expires March 30, 1975

[illegible]

Filed Nov 18, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RANDOLPH PHILLIPS,

Plaintiff,

-against-

INVESTORS DIVERSIFIED SERVICES, INC.,

Defendant.

AMENDED COMPLAINT

72 Civil 1544 (CHT)

COUNT I.

1. Plaintiff Randolph Phillips is a citizen of the State of New York.

2. Defendant Investors Diversified Services, Inc. is a corporation incorporated under the laws of the State of Minnesota with its principal offices in that State.

3. The amount in controversy, exclusive of interest and costs, exceeds $10,000.00.

4. On September 8, 1960 a complaint was filed in this Court in the name of John D. Murchison, Clint W. Murchison, Jr. and Gerard Fossland, plaintiffs, against Allan P. Kirby, Randolph Phillips, Charles T. Ireland, Jr., Fred M. Kirby et al., 60 Civil Action 3511. On or about September 8, 1960 a similar complaint was filed in the Supreme Court of the State of New York, County of New York, in the name of Theodore Freeman et ano. against the same defendants (except Fred M. Kirby), Index No. 13114/60; and a duplicate thereof in this Court, 60 Civil Action No. 3502. All of said 3 actions were alleged as derivative actions on behalf of Alleghany Corporation.

5. Plaintiff herein was served and appeared as a defendant in all of the 3 aforesaid civil actions.

6. At the time of the institution of the said 3 civil actions plaintiff herein was a director of defendant Investors Diversified Services, Inc. (hereinafter referred to as "IDS"), and was Chairman of the Finance and Law Committee of the Board of Directors of IDS, and he was sued both as a director and as Chairman of said Committee.

7. At the time of the institution of the said 3 civil actions and to date Alleghany Corporation owned the controlling stock of IDS and controlled the management of said company.

8. On April 8, 1961 a judgment was entered in this Court dismissing 60 Civil 3502 as having been filed in violation of Rule 11 of the Federal Rules of Civil Procedure, prohibiting the filing of "sham" and false complaints.

9. The aforesaid Murchison complaint consisted of two counts, the first of which alleged that plaintiff herein had entered into a conspiracy to defraud Alleghany Corporation, its shareholders and this Court and had breached his fiduciary duties to said Corporation and shareholders by committing acts of fraud upon them in a corrupt bargain which included the betrayal of his fiduciary duties in return for his aforesaid positions with IDS and the emoluments thereof; and the second count alleged that as a director of IDS and Chairman of said Committee he had consummated said conspiracy by causing irresponsible corporate acts to be taken and which betrayed the integrity of the corporate management.

10. On June 27, 1962 the complaint was amended to substitute Alleghany Corporation as plaintiff in place of the original plaintiffs, and on December 18, 1962, an amended and supplemental complaint was filed which dropped the allegations of the second count of the original complaint.

11. After trial on the merits 60 Civil 3511 was dismissed as to plaintiff herein by final judgment entered on June 5, 1963, pursuant to an Opinion of this Court reported at 218 F. Supp. 164, and which held

that plaintiff "has failed complately to establish" the fraud alleged in the complaint.

12. On June 5, 1963 this Court entered judgment: "That the defendants have judgment against the plaintiff dismissing the complaint with costs and disbursements."

13. Under New York law "costs" whenever any person is "made a party to an action, suit or proceeding by reason of the fact that he * * * is or was a director, officer or employee of a corporation" include "his reasonable expenses, including attorneys' fees, actually and necessarily incurred by him in connection with the defense of such action, suit or proceeding" "except in relation to matters as to which it shall be adjudged in such action, suit or proceeding that such officers, director or employee is liable for negligence or misconduct in the performance of his duties." (General Corporation Law, § 64 (1963)).

[illegible]

14. Rule 58 of the Federal Rules of Civil Procedure provides in pertinent part that "Entry of judgment shall not be delayed for the taxing of costs. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course." No direction for taxing of costs has been made.

15. No appeal was taken by plaintiff Alleghany Corporation from that part of the aforesaid final judgment dismissing the action against plaintiff Randolph Phillips herein but an appeal was taken by Alleghany Corporation from that part of the final judgment dismissing the complaint against defendants Kirby and Ireland.

16. Under date of June 5, 1963 the law firm of Donovan, Leisure, Newton & Irvine by Robert M. Loeffler, Esq., wrote a letter to Mr. Michael Genovese, Judgment Clerk of this Court, with respect to the judgment to be entered in 60 Civil 3511, stating: "Iis requested that language as follows be added to the judgment which you prepare:

> 'Jurisdiction is retained for the purpose of hearing and determining applications for reimbursement for costs and expenses, including attorneys' fees, incurred by defendants.'
>
> "Defendants have certain rights to indemnification and reimbursement under the By-Laws of Alleghany Corporation and the statutes of New York and Maryland. While we believe that the defendants would be entitled to assert those rights either by independent action or by application to this Court in this action, regardless of express provision therefor in the judgment, we believe that the inclusion of the above language in the judgment is nevertheless appropriate as confirming the continuing jurisdiction by this Court to entertain applications with respect to such rights."

17. Stuart N. Updike, attorney for plaintiff Alleghany Corporation, also by letter dated June 5, 1963, objected to the inclusion of the aforesaid language in the judgment at that time, apparently because he had determined to appeal on behalf of his client, and as a result this Court did not amend the judgment as requested.

18. Subsequently the decision reported at 218 F. Supp. 164 dismissing the case as to defendants Kirby and Ireland was affirmed on appeal (Alleghany Corporation v. Kirby et al., in banc 340 F. 2d 311 (1965), cert. dismissed as improvidently granted, sub. nom. Holt v. Kirby et al., 384 U.S. 28 (1966), rehearing denied 384 U.S. 967 (May 31, 1966). Smith v. Fitzsimmons et al., 394 F. 2d 381 (1968); and Most v. Kirby et al., USDC SDNY 66 Civil 962, dismissed by order entered February 17, 1970.

19. At no time after the termination of the above litigation was plaintiff advised that applications for reimbursement could be made.

20. Plaintiff is an attorney as defined by the New York Civil Practice Act, § 105 (c), and served as such in the defense of the aforesaid civil actions.

21. Plaintiff expended 1,899 hours of time as attorney pro se during 245 days from September 1960 to April 1963 in successfully defending himself against the charges of fraud, conspiracy and breach of fiduciary duty alleged against him as a fiduciary, director, agent and employee of Alleghany and IDS in said civil actions, and upon trial of which he was completely vindicated.

22. The reasonable value of said services by plaintiff was $60 per hour, based on the award to him in Zenn v. Anzalone, 46 Misc. 2d 378, of a fee of $403,000 for 6800 hours service to the Alleghany Corporation for the years 1954-1960, prior to the institution of 60 Civil 3511.

23. By reason of the aforesaid Section 64 of the General Corporation Law of New York, which was in effect in 1960 to April, 1963, an implied in law or quasi-contract exists between plaintiff and defendant IDS to pay him the fair and reasonable value of his services in defending against the charges in 60 Civil 3511.

24. Plaintiff has repeatedly demanded of IDS or its legal representatives since June 16, 1970 that it pay his claim under the afore-mentioned statute.

25. By letter dated November 30, 1970 and by other acts thereafter defendant IDS has refused to pay said claim in breach of the aforesaid quasi or implied in law contract.

WHEREFOR, plaintiff demands judgment against defendant Investors Diversified Services, Inc. compelling it to pay him the sum of $60 per hour for 1,899 hours expended by him in the defense of the aforesaid civil actions.

COUNT II.

26. Plaintiff repeats with the same force and effect as if separately realleged herein each and every allegation of paragraphs 1 through 25 under Count I.

27. Plaintiff was sued in the aforesaid suit as agent for his acts and transactions made on behalf of defendant IDS as principal.

28. By reason of the aforesaid facts defendant IDS is liable to plaintiff under an implied or quasi-contract, which it has breached, for the expenses of his defense in being compelled to defend a baseless suit, including loss of time.

29. Said loss of time, excluding the time for which plaintiff was paid by defendant IDS as Chairman of the Finance & Law Committee, amounted to 120 days and at 8 hours per day a total of 960 hours.

30. The reasonable value of plaintiff's time as shown by the aforesaid award in the Zenn case was $60 per hour.

WHEREFOR, plaintiff demands judgment against defendant Investors Diversified Services, Inc. in the amount of $57,600.00, plus 7 1/2% interest compounded annually thereon since June 5, 1963.

COUNT III.

31. Plaintiff repeats and realleges with the same force and effect as if separately realleged herein each and every allegation of Counts I and II, paragraphs 1 through 30 inclusive.

32. Under the common law of the State of Minnesota at the time of the aforesaid litigation reasonable costs and expenses incurred by a corporate director in defending an action brought against him charging him with dereliction of duty could be paid out of the corporate funds.

33. Plaintiff's acts in vindication of the corporate management of IDS of which he was a part and of its integrity was beneficial

to the corporation from the standpoint of preserving the confidence of its creditors and of its prospective investors and of the 1,000,000 investors in mutual fund companies with $3 billion of assets managed in 1960-1963 by defendant IDS.

34. By reason of the aforesaid facts defendant IDS is liable to plaintiff under an implied or quasi contract, which it has breached, for the expenses of his defense in being compelled to defend a baseless suit, including loss of time.

35. Had plaintiff retained an attorney at law to defend him instead of acting as his own attorney defendant IDS would have been compelled to pay said attorney-at-law at least $57,600, the same sum requested herein by plaintiff. Thus by retaining this sum of money and not paying it to plaintiff as the fair value of his services for the aforesaid benefits to IDS, pursuant to said implied or quasi contract, defendant IDS is liable for unjust enrichment.

WHEREFOR, plaintiff demands judgment against defendant Investors Diversified Services, Inc. in the amount of $57,600.00, plus 7 1/2% interest compounded annually from June 5, 1963.

COUNT IV.

36. Plaintiff repeats and realleges with the same force and effect as if separately realleged here each and every allegation in paragraph 1 through 35 above under Counts I, II, and III.

37. By reason of the aforesaid facts plaintiff is entitled to a recovery in quantum meruit of the reasonable value of plaintiff's services to defendant IDS.

38. Said reasonable value is $57,600.00, plus 7 1/2% interest compounded annually from June 3, 1963.

COUNT V.

39. Plaintiff repeats and realleges with the same force and effect as if separately realleged herein each and every allegation of Counts I through IV, inclusive.

40. Defendant IDS has refused to pay plaintiff's claim as hereinabove alleged on the ground that he rendered the above related services as an attorney pro se and not as an attorney at law.

41. Plaintiff rendered said services as an "attorney", as defined in the New York Civil Practice Act, § 105 (c). (1963)

42. Said § 105 (c) makes no distinction between the rights of an attorney-at-law and an attorney pro se.

43. The courts of the United States have repeatedly compensated plaintiff for services rendered as an attorney pro se.

44. Defendant IDS's refusal to compensate plaintiff for his services as above related because he is not an attorney at law and rendered them as attorney pro se constitutes a denial to plaintiff of the Equal Protection of the Law guaranteed to him by the Fourteenth Amendment to the Constitution of the United States, and as set forth in Section 105(c) of the New York Civil Practice Act.

45. Pursuant to said section plaintiff performed the same services with the same successful result as could have been achieved by any other attorney as defined in said section.

46. The denial of compensation to plaintiff puts a greater burden and charge upon plaintiff as an attorney pro se than are imposed upon other persons whose services are within the scope of Section 105(c).

WHEREFOR, plaintiff demands a declaratory judgment that the denial to him of compensation for his services as an attorney, pursuant to Section 105(c) of the New York Civil Practice Act, is in violation of his right under the Fourteenth Amendment to the Constitution of the United States, to the Equal Protection of the Law; and plaintiff further demands a declaratory judgment that he is entitled to equal compensation for equal services to those rendered by an attorney at law in the successful defense of said civil actions.

COUNT VI.

47. Plaintiff repeats with the same force and effect as if separately realleged herein each and every allegation of Counts I through V, inclusive.

48. The acts of defendant IDS in proposing that this Court deprive plaintiff of compensation for his services constitute an attempt to have this Court deprive plaintiff of the value of 120 days of service and 960 hours of time in violation of the Due Process of Law clause of the Fifth Amendment to the Constitution of the United States.

WHEREFOR, plaintiff demands a declaratory judgment that the defendant Investors Diversified Services, Inc. is not entitled to deprive plaintiff of the fair value of his services herein through the process of this Court, as such an act would be in violation of plaintiff's rights under the Due Process of Law clause in the Fifth Amendment of the Constitution of the United States.

RANDOLPH PHILLIPS
Plaintiff Pro Se
30 East 72nd Street
New York, N. Y. 10021
212 734 6776

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - x

RANDOLPH PHILLIPS,	:	
Plaintiff,	:	
-against-	:	72 Civ. 1544 (CHT)
INVESTORS DIVERSIFIED SERVICES, INC.,	:	ANSWER
	:	
Defendant.	:	

- - - - - - - - - - - - - - - - - - x

Defendant, Investors Diversified Services, Inc. ("IDS"), for its answer to the amended complaint herein, respectfully alleges:

IN ANSWER TO COUNT I

1. On information and belief, admits the allegations contained in paragraph 1 of the amended complaint.

2. Admits the allegations contained in paragraph 2 of the amended complaint.

3. Denies the allegations contained in paragraph 3 of the amended complaint.

4. On information and belief, admits the allegations contained in paragraph 4 of the amended complaint, except alleges that in or about June 1962, the action commenced as Murchison, et al. v. Kirby, et al. (S.D.N.Y., 60 Civ. 3511), ceased to be prosecuted derivatively on behalf of Alleghany Corporation and was thereafter prosecuted in this Court and in the United States Court of Appeals for the Second Circuit by Alleghany Corporation as plaintiff.

5. On information and belief, admits the allegations contained in paragraph 5 of the amended complaint.

6. Admits so much of the allegations contained in paragraph 6 of the amended complaint as allege that plaintiff was a member of the Board of Directors of IDS and Chairman of the Finance & Law Committee of the IDS Board of Directors on September 8, 1960; denies each and every other allegation contained in paragraph 6 of the amended complaint; and respectfully refers to the pleadings and proceedings in the three actions described in paragraph 4 of the amended complaint for the basis upon which plaintiff was sued in those actions.

7. Admits the allegations contained in paragraph 7 of the amended complaint, except denies that Alleghany Corporation has controlled the management of IDS from September 8, 1960 to present.

8. On information and belief, admits the allegations contained in paragraph 8 of the amended complaint, except alleges that the judgment in this Court dismissing Freeman v. Kirby, et al., 60 Civ. 3502, was on April 6, 1961.

9. Denies the allegations contained in paragraph 9 of the amended complaint, and respectfully refers to the pleadings in Murchison, et al. v. Kirby, et al. (S.D.N.Y., 60 Civ. 3511), for an accurate description of the contents thereof.

10. On information and belief, admits the allegations contained in paragraph 10 of the amended complaint.

11. On information and belief, admits the allegations contained in paragraph 11 of the amended complaint.

12. On information and belief, admits the allegations contained in paragraph 12 of the amended complaint.

13. Admits that paragraph 13 of the amended complaint quotes with substantial accuracy certain portions of Section 64 of the New York General Corporation Law as it existed in 1963, and otherwise denies the allegations contained in paragraph 13 of the amended complaint.

14. Admits that paragraph 14 of the amended complaint quotes with substantial accuracy certain portions of Rule 58 of the Federal Rules of Civil Procedure, and on information and belief denies the other allegations contained in paragraph 14 of the amended complaint.

15. On information and belief, admits the allegations contained in paragraph 15 of the amended complaint.

16. Admits that paragraph 16 of the amended complaint quotes with substantial accuracy certain portions of a letter dated June 5, 1963, from Robert M. Loeffler, Esq., then a member of the law firm of Donovan Leisure Newton & Irvine, to Mr. Michael Genovese, then the Judgment Clerk of this Court.

17. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 17 of the amended complaint.

18. Admits the allegations contained in paragraph 18 of the complaint, except denies that the opinions cited in Smith v. Fitzsimmons, et al. and Most v. Kirby, et al. related to determination or dismissal of Alleghany Corporation v. Kirby, et al. (S.D.N.Y., 60 Civ. 3511).

19. On information and belief, denies the allegations contained in paragraph 19 of the amended complaint.

20. Denies the allegations contained in paragraph 20 of the amended complaint.

21. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 21 of the amended complaint that plaintiff expended 1,899 hours of time during 245 days from September 1960 to April 1963 in his pro se defense, and that plaintiff was "completely vindicated" of the charges made against him; denies the allegations contained in paragraph 21 of the amended complaint with respect to the nature of the charges made against plaintiff, and respectfully refers to the pleadings and proceedings in the three actions described in paragraph 4 of the amended complaint for the basis upon which plaintiff was sued in those actions; and admits the allegations contained in paragraph 21 of the amended complaint that plaintiff was successful after trial in his pro se defense in Alleghany Corporation v. Kirby, et al. (S.D.N.Y., 60 Civ. 3511).

22. Denies the allegations contained in paragraph 22 of the amended complaint, and respectfully refers to the opinion in Zenn v. Anzalone, 46 Misc.2d 378 (Sup.Ct., N.Y.Co. 1965), for an accurate description of the contents thereof.

23. Denies the allegations contained in paragraph 23 of the amended complaint, except admits that Section 64 of the New York General Corporation Law was in effect during the period from 1960 to April 1963.

24. Denies the allegations contained in paragraph 24 of the amended complaint, except admits that by letter dated June 16, 1970, plaintiff first demanded that IDS pay him $94,950.00 for his time spent in 1961 through 1963 in connection with the matters which are the subject of this action.

25. Denies the allegations contained in paragraph 25 of the amended complaint, except admits that by letter dated November 30, 1970, counsel for IDS conveyed its refusal to pay plaintiff's purported claim, and that IDS continues to refuse to pay plaintiff's purported claim.

IN ANSWER TO COUNT II

26. In response to the allegations contained in paragraph 26 of the amended complaint, repeats and realleges the allegations contained in paragraphs 1 through 25 hereof.

27. Denies the allegations contained in paragraph 27 of the amended complaint.

28. Denies the allegations contained in paragraph 28 of the amended complaint.

29. Denies the allegations contained in paragraph 29 of the amended complaint.

30. Denies the allegations contained in paragraph 30 of the amended complaint.

IN ANSWER TO COUNT III

31. In response to the allegations contained in paragraph 31 of the amended complaint, repeats and realleges the allegations contained in paragraphs 1 through 30 hereof.

32. Denies the allegations contained in paragraph 32 of the amended complaint.

33. Denies the allegations contained in paragraph 33 of the amended complaint that plaintiff acted "in vindication of the corporate management of IDS . . . and of its integrity," and denies knowledge or information sufficient to form a belief as to the truth of the other allegations contained in paragraph 33 of the amended complaint.

34. Denies the allegations contained in paragraph 34 of the amended complaint.

35. Denies the allegations contained in paragraph 35 of the amended complaint.

IN ANSWER TO COUNT IV

36. In response to the allegations contained in paragraph 36 of the amended complaint, repeats and realleges the allegations contained in paragraphs 1 through 35 hereof.

37. Denies the allegations contained in paragraph 37 of the amended complaint.

38. Denies the allegations contained in paragraph 38 of the amended complaint.

IN ANSWER TO COUNT V

39. In response to the allegations contained in paragraph 39 of the amended complaint, repeats and realleges the allegations contained in paragraphs 1 through 38 hereof.

40. Denies the allegations contained in paragraph 40 of the amended complaint.

41. Denies the allegations contained in paragraph 41 of the amended complaint.

42. Denies the allegations contained in paragraph 42 of the amended complaint.

43. Denies the allegations contained in paragraph 43 of the amended complaint.

44. Denies the allegations contained in paragraph 44 of the amended complaint.

45. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 45 of the amended complaint, except denies that plaintiff was or is an attorney.

46. Denies the allegations contained in paragraph 46 of the amended complaint.

IN ANSWER TO COUNT VI

47. In response to the allegations contained in paragraph 47 of the amended complaint, repeats and realieges the allegations contained in paragraphs 1 through 46 hereof.

48. Denies the allegations contained in paragraph 48 of the amended complaint.

FIRST AFFIRMATIVE DEFENSE

49. The amended complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

50. Plaintiff's purported claims arose on June 5, 1963, when final judgment in his favor was entered in Alleghany Corporation v. Kirby, et al. (S.D.N.Y., 60 Civ. 3511).

51. Plaintiff commenced the instant action in April 1972, nine years after his purported claims arose.

52. The purported claims contained in plaintiff's amended complaint are barred by the applicable statute of limitations.

THIRD AFFIRMATIVE DEFENSE

53. Plaintiff served as Chairman of the Finance & Law Committee of the IDS Board of Directors from June 22, 1960 to May 31, 1961, and was compensated by IDS for his full time services as Chairman of said Committee.

54. Plaintiff was compensated by IDS for his services as Chairman of the Finance & Law Committee of the IDS Board of Directors at a rate of $2,500.00 per month, was provided with office space, secretarial and clerical help and reimbursed for his reasonable expenses.

55. The only claim against plaintiff in any of the actions described in paragraph 4 of the amended complaint which was made by reason of the fact that he was a director, officer or employee of IDS was that contained in Count II of the original complaint in Murchison, et al. v. Kirby, et al. (S.D.N.Y., 60 Civ. 3511).

56. Count II in Murchison, et al. v. Kirby, et al. (S.D.N.Y., 60 Civ. 3511) was not prosecuted at any time

after May 1961.

57. Plaintiff was compensated by IDS for his full time services throughout the period from September 1960 through May 1961.

58. On information and belief, plaintiff additionally served as a consultant to and was compensated by Alleghany Corporation during the period September 1960 through May 1961 at an annual rate of $20,000.00, which was paid in quarterly sums of $5,000.00.

59. As a result of the foregoing, plaintiff suffered no loss or damage on account of the matters complained of in the amended complaint.

FOURTH AFFIRMATIVE DEFENSE

60. Plaintiff is not and never has been an attorney at law.

61. Plaintiff voluntarily chose to represent himself in the defense of the actions described in paragraph 4 of the amended complaint.

62. The purported claims asserted by plaintiff herein seek compensation for time he allegedly spent in defending himself in the actions described in paragraph 4 of the amended complaint.

63. IDS was not a party to the actions described in paragraph 4 of the amended complaint.

64. There is no basis under the applicable statutes of Minnesota, the State of incorporation of IDS, or under the applicable statutes of New York, the State where the actions described in paragraph 4 of the amended complaint were brought

and determined, for compelling the payment to plaintiff of compensation for time he allegedly spent in defending himself in the actions described in paragraph 4 of the amended complaint.

FIFTH AFFIRMATIVE DEFENSE

65. Plaintiff has not alleged any colorable claim against IDS.

66. Plaintiff has not suffered any damage as a result of the matters complained of in the amended complaint.

67. Plaintiff purports to invoke the subject matter jurisdiction of this Court pursuant to 28 U.S.C.§1332(a).

68. The matter in controversy herein does not exceed the sum or value of $10,000.00, exclusive of interest and costs.

69. This Court lacks jurisdiction over the subject matter of this action.

70. As a result of the foregoing, this action should be dismissed, and costs should be imposed on the plaintiff.

SIXTH AFFIRMATIVE DEFENSE

71. IDS repeats and realleges the allegations contained in paragraphs 60 through 63 hereof.

72. The purported claims asserted by plaintiff herein constitute an effort to collect legal fees by a person who is not an attorney at law.

73. Recovery by plaintiff on the purported claims asserted herein would be in violation of the public policy of the State of New York.

SEVENTH AFFIRMATIVE DEFENSE

74. Plaintiff commenced this action in April 1972 against both IDS and Alleghany Corporation, seeking joint or several recovery from either IDS or Alleghany Corporation on account of the transactions and occurrences complained of herein.

75. On or about December 12, 1963, plaintiff made application to this Court in Alleghany Corporation v. Kirby, et al. (S.D.N.Y., 60 Civ. 3511) for recovery from Alleghany Corporation on account of the same transactions and occurrences complained of herein, but on or about January 31, 1964, said application was returned to plaintiff by Judge Dawson of this Court for failure to show proof of service or to specify a return date for said motion.

76. On or about September 21, 1964, plaintiff again made application to this Court in Alleghany Corporation v. Kirby, et al. (S.D.N.Y., 60 Civ. 3511) for recovery from Alleghany Corporation on account of the same transactions and occurrences complained of herein, but withdrew said application on or about October 13, 1964.

77. On or about October 13, 1964, plaintiff commenced an action against Alleghany Corporation in the Supreme Court of the State of New York, County of New York (Index No. 15360/1964), for recovery from Alleghany Corporation on account of the same transactions and occurrences complained

of herein, which action was dismissed pursuant to stipulation on or about January 8, 1965, for lack of subject matter jurisdiction.

78. On or about August 2, 1965, plaintiff commenced an action against Alleghany Corporation in the Supreme Court of the State of New York, County of New York (Index No. 12788/1965), seeking recovery from Alleghany Corporation, inter alia, on account of the same transactions and occurrences complained of herein, which action was dismissed with prejudice by order entered and filed on June 6, 1966.

79. Plaintiff alleges in his amended complaint herein that Alleghany Corporation owned the controlling stock of IDS and controlled the management of IDS at the time of the transactions and occurrences upon which he bases his purported claims herein and at all times thereafter.

80. By reason of the foregoing, plaintiff is estopped from maintaining the instant action against IDS and from asserting the purported claims herein against IDS.

EIGHTH AFFIRMATIVE DEFENSE

81. IDS repeats and realleges the allegations contained in paragraphs 50, 51 and 74 through 79 hereof.

82. The purported claims contained in plaintiff's amended complaint are barred by laches.

WHEREFORE, defendant respectfully demands that judgment be entered dismissing plaintiff's amended complaint, with the costs and disbursements of this action imposed against the plaintiff.

Dated: New York, New York
December 20, 1974

MARSHALL, BRATTER, GREENE,
ALLISON & TUCKER

By
A Member of the Firm

Attorneys for Defendant
Investors Diversified Services,
Inc.
430 Park Avenue
New York, New York 10022
212 421-7200

TO:

Mr. Randolph Phillips
Plaintiff *Pro Se*
30 East 72nd Street
New York, New York

RP

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RANDOLPH PHILLIPS, Plaintiff, -against- INVESTORS DIVERSIFIED SERVICES, INC., Defendant.	72 Civil 1544 (CHT) NOTICE OF MOTION under Rule 11 of the Federal Rules of Civil Procedure

---

PLEASE TAKE NOTICE THAT, UPON THE ANNEXED AFFIDAVIT of RANDOLPH PHILLIPS, affirmed to January 17, 1975 and the exhibits thereto, plaintiff Randolph Phillips, will move this Court, on the 27th day of January, 1975, at 10:00 A. M., in Room 1904, United States Court House, Foley Square, New York, N. Y. for an order pursuant to Rule 11 of the Federal Rules of Civil Procedure, striking the ANSWER of defendant Investors Diversified Services, Inc. as sham and false and as having been made in violation of said Rule 11.

Dated: New York, N. Y.
January 17, 1975

RANDOLPH PHILLIPS
Plaintiff Pro Se
30 East 72nd Street
New York, N. Y. 10021
737-6776

TO: Richard L. Bond, Essq.
Marshall, Bratter, Greene, Allison & Tucker
430 Park Avenue
New York, N. Y. 10022

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RANDOLPH PHILLIPS,

Plaintiff,

-against-

INVESTORS DIVERSIFIED SERVICES, INC.,

Defendant.

----

72 Civil 1544 (CHT)

AFFIDAVIT
Pursuant to Rule 11
of the Federal Rules
of Civil Procedure

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

RANDOLPH PHILLIPS, being duly affirmed deposes and says: I am the plaintiff herein and I make this affidavit in support of my motion under Rule 11 of the Federal Rules of Civil Procedure for an order of this Court striking the ANSWER of defendant Investors Diversified Services, Inc. as sham and false and as having been made in violation of said Rule 11.

1. The amended complaint herein was filed and served on November 18, 1974. (See Exhibit A to affidavit of Richard L. Bond sworn to December 20, 1974)

2. The ANSWER to the amended complaint was filed and served on December 20, 1974. (Id., Exhibit B)

3. Rule 11 of the Federal Rules of Civil Procedure provides in pertinent part:

> "The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay. If a pleading * * * is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action. * * *."

4. I hereby allege that Richard L. Bond, the attorney who signed the aforesaid ANSWER is acting under the control and direction of John E. Tobin, a member of the law firm of Donovan Leisure Newton & Irvine, in opposing the claims of plaintiff set forth in the amended complaint.

5. The firm of Donovan Leisure is General Counsel for defendant IDS and Tobin is the partner in charge of said account and has been for many years

6. As shown hereinafter, the Donovan Leisure law firm supported the basic claim of the amended complaint in this civil action, prior to its filing, for "an order granting * * * Randolph Phillips (his) expenses, including reasonable attorneys' fees incurred in (his) defense to date (June 21, 1962) of the Murchison action (par. 21, infra) and in defense of the Alleghany action to final judgment on June 5, 1963 (par. 23, infra).

7. COUNT I of the amended complaint is based on the N. Y. General Corporation Law, Section 64 (1963) reading:

> "Any person made a party to an action, suit or proceeding by reason of the fact that he * * * is or was a director, officer or employee of a corporation shall be entitled to have his reasonable expenses, including attorneys' fees, actually and necessarily incurred by him in connection with the defense of such action, suit or proceeding * * * assessed against the corporation * * * except in relation to matters as to which it shall be adjudged in such action, suit or proceeding that such officer, director or employee is liable for negligence or misconduct in the performance of his duties."

8. I was made a party defendant to Murchison v. Allan P. Kirby, Randolph Phillips, Fred M. Kirby, Charles T. Ireland et al., 60 Civil Action 3511 (S. D. N. Y.), a derivative action on behalf of Alleghany Corporation, then and now in control

of defendant Investors Diversified Services, Inc. (hereinafter IDS), the complaint in which was filed on September 8, 1960.

9. At the time of filing I was a director and Chairman of the Finance & Law Committee of IDS, having been proposed for those offices by Carl E. Newton, Esq., senior partner of Donovan, Leisure, Newton & Irvine, and an attorney of the highest character and capability. (Alleghany Corporation v. Kirby, 218 F. Supp. at)

10. The following relief was sought by the Murchisons against me under the Second Count of their action:

> *Under the Second Count:*
>
> **(h)** that this Court temporarily and permanently enjoin Phillips from acting as a director of IDS;
>
> **(i)** that Phillips be ordered to repay to IDS the sums of money received by him as a salary or other compensation;
>
> **(j)** that this Court temporarily and permanently enjoin Kirby from interfering with the exercise of independent judgment and discretion by the directors of Alleghany and IDS;
>
> **(k)** that defendant directors of Alleghany be ordered to take such steps as may be appropriate to effect the removal of Randolph Phillips as a director of IDS, and to cause Alleghany's shareholdings in IDS to be voted for an independent director motivated solely by the best interests of IDS;
>
> **(l)** that Kirby, Ireland and Phillips be directed to account to Alleghany for, and to pay, all damages sustained by Alleghany
>
> > **(i)** from the reduction in the market value of IDS shares upon announcement of the election of Randolph Phillips as a director of IDS;
> >
> > **(ii)** from the further reduction in the market value of IDS shares, occurring after and resulting from the activities and conduct of Randolph Phillips as a director of IDS and as a member of the Subcommittee; and

(iii) as a result of benefits received by Kirby, Phillips or Ireland flowing from the overt acts in furtherance of the conspiracy, which are described in Count Two;

(m) that this Count temporarily and permanently enjoin Alleghany and its directors from causing or allowing Randolph Phillips to be in any way connected with or to perform any services for IDS or Aleghany or any of their respective affiliates;

(n) that this Court temporarily and permanently enjoin Phillips, Ireland and Fred M. Kirby from continuing to act in any capacity on the IDS Subcommittee, and declare their prior activities in connection with said Subcommittee unlawful and invalid; and

Under Both Counts:

(o) that plaintiffs be granted such other and further relief as the Court may deem just and proper, including reasonable compensation for their counsel and the costs and disbursements of this action.

TOWNLEY, UPDIKE, CARTER &
RODGERS
Attorneys for Plaintiffs

11. After the filing of an amended and supplemental complaint in which Alleghany Corporation was substituted as plaintiff, the action was tried before the late Judge Dawson in April, 1963, who found it to be completely and utterly without merit. (218 F. Supp. 164).

12. The law firm of Donovan Leisure Newton & Irvine acted as attorneys in said action for defendants Allan P. Kirby and Fred M. Kirby. I acted as attorney pro se.

13. The Kirby family then and now were the largest stockholders of Alleghany Corporation, which controls IDS, and Fred M. Kirby, who was a defendant in the Murchison case is now Chairman of the Board of defendant IDS, and also is the Chairman of the Board and Chief Executive Officer of Alleghany Corporation which is also represented by Donovan Leisure Newton & Irvine.

14. On June 5, 1963 this Court entered judgment in 60 Civil 3511: "That the defendants have judgment against the plaintiff dismissing the complaint with costs and disbursements."

15. Since then I have unsuccessfully sought the payment to me by Alleghany Corporation, (which in June 1962 was substituted as plaintiff for the Murchisons) of "the reasonable expenses, including attorneys' fees" to which as an acquitted defendant director and Chairman of IDS I am "entitled" under Section 64 of the General Corporation Law of New York.

16. After years of fruitless demands and attempts to obtain this payment voluntarily from either Alleghany or IDS (each being equally liable under said statute), I filed this action in April, 1972.

17. By interlocutory order of this Court in September, 1972 Alleghany was dismissed from this action by Judge Brieant on jurisdictional grounds, leaving IDS as the sole defendant.

18. Defendant IDS's ANSWER in total substance and effect pleads that plaintiff is not entitled to an order of this Court granting his expenses, including reasonable attorneys' fees in successfully defending against the Murchison and Alleghany complaints from September, 1960 to April, 1963.

19. As we show hereinafter, the law firm of Donovan Newton Leisure & Irvine, General Counsel to defendant IDS, represented the exact opposite to this Court in 1962 and 1963, when John E. Tobin, Esq. was as he is today a member of that law firm.

I. The lack of "good ground" (Rule 11, F. R. C. P.) by IDS counsel for alleging in its ANSWER that plaintiff is not "entitled" to an order of this Court granting him "expenses, including reasonable attorneys' fees" incurred in his defense of the Murchison and Alleghany complaints.

20. Since attorney Bond is required by Rule 11 to sign the ANSWER herein "to the best of his knowledge, information and belief that there is good ground to support it", it is elementary that he must have investigated the existing record relating to the claims denied by him as IDS attorney. (*Freeman* v. *Kirby et al.*, 27 F. R. D. 395.) (S. D. N. Y. 1961)

21. He failed so to do or he is misrepresenting the position of the law firm of Donovan Leisure Newton & Irvine, *General Counsel of IDS*, as shown by the following quotation from a MEMORANDUM OF DEFENDANTS ALLAN P. KIRBY, FRED M. KIRBY AND CHARLES T. IRELAND, JR. IN OPPOSITION TO APPLICATION BY ALLEGHANY CORPORATION FOR LEAVE TO FILE AN AMENDED COMPLAINT AND FOR OTHER RELIEF, filed in the *Murchison* action in this Court on or about June 21, 1962, and signed by DONOVAN LEISURE NEWTON & IRVINE Attorneys for Defendants Allan P. Kirby and Fred M. Kirby, and KISSAM & HALPIN, Attorneys for Defendant Charles T. Ireland, Jr., ROY W. McDONALD, LEO T. KISSAM, WALTER L. STRATTON, ANTHONY S. GENOVESE:

> "In the case at bar, it is respectfully submitted, that dismissal of Count II should be with prejudice as to all defendants who have appeared and should be

> *upon an order granting defendants* Allan P. Kirby, Fred M. Kirby, Charles T. Ireland, Jr. and *Randolph Phillips the expenses, including reasonable attorneys' fees, incurred in their defense to date of Count II.*" (Exhibit A to this affidavit, pp. 7-8) (emphasis supplied) *

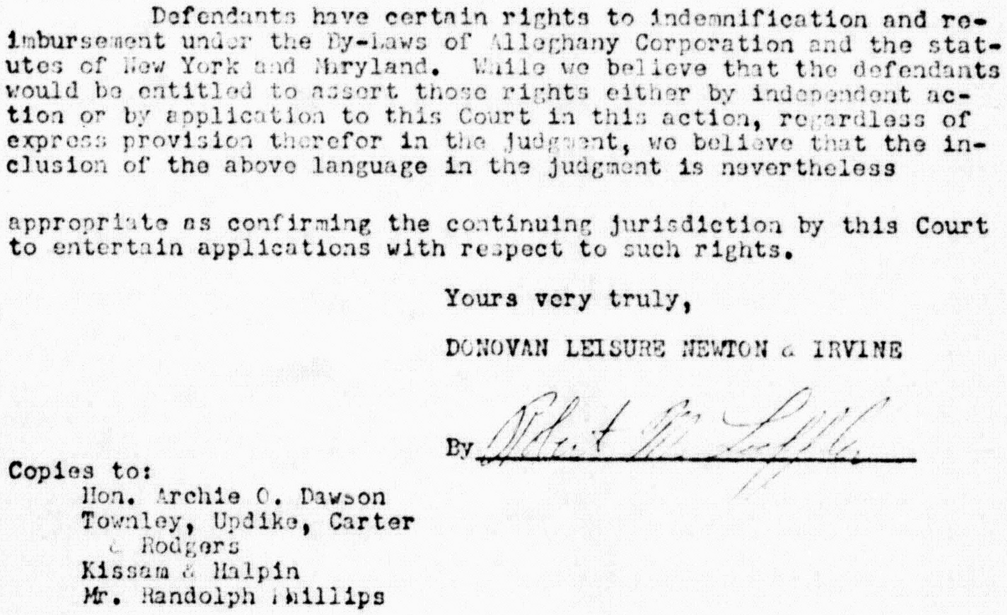
22. Since Judge Dawson denied the application of Alleghany this issue was not determined, but on December 18, 1962 Alleghany upon leave being granted filed an amended and supplemental complaint which formally dropped Count II but included 5 paragraphs of said count. It was this amended and supplemental complaint which went to trial in April 1963 and resulted in the final judgment for all defendants quoted in paragraph 14 above.

23. Simultaneously with the entry of this final judgment the law firm of Donovan Leisure Newton & Irvine wrote a letter signed by Robert M. Loeffler, Esq., a partner thereof, dated June 5, 1963, to Michael Genovese, Judgment Clerk of this Court, stating in pertinent part:

> Re: *Alleghany Corporation v. Kirby, et al., Civil Action No. 60-3511*
>
> Dear Mr. Genovese:
>
> This will confirm our telephone conversation of yesterday afternoon with respect to the judgment to be entered in the above entitled action pursuant to Judge Dawson's decision of May 28, 1963.
>
> It is requested that language as follows be added to the judgment which you prepare:
>
> > "Jurisdiction is retained for the purpose of hearing and determining applications for reimbursement for costs and expenses, including attorneys' fees, incurred by defendants."

---

* The representation by the Donovan Leisure law firm that Randolph Phillips was entitled to "attorneys' fees" was and is consistent with N. Y. Civil Practice Act 7(9) which was in effect during the *Murchison* litigation. There an "attorney" is defined to include "a party prosecuting or defending (an action) in person * * *.) This section is now CPLR 105 (c).



Defendants have certain rights to indemnification and reimbursement under the By-Laws of Alleghany Corporation and the statutes of New York and Maryland. While we believe that the defendants would be entitled to assert those rights either by independent action or by application to this Court in this action, regardless of express provision therefor in the judgment, we believe that the inclusion of the above language in the judgment is nevertheless

appropriate as confirming the continuing jurisdiction by this Court to entertain applications with respect to such rights.

Yours very truly,

DONOVAN LEISURE NEWTON & IRVINE

By

Copies to:
Hon. Archie O. Dawson
Townley, Updike, Carter
& Rodgers
Kissam & Halpin
Mr. Randolph Phillips

24. I must now call this Court's attention to another aspect of this shabby affair wherein a powerful law firm through its appointed agent, the attorney of record herein, seeks to destroy a clearly admitted right of compensation to a party pro se for honest and successful work over a 4-year period.

25. Faced with the embarrassment of Loeffler's letter to this Court dated June 5, 1963 with its clear application to the rights of "Mr. Randolph Phillips", attorney Bond procured an affidavit sworn to by Loeffler on October 25, 1974 in this Court in this action in which he stated in pertinent part, apparently being totally unaware of the aforesaid MEMORANDUM of June 21, 1962 signed by his partners at Donovan Leisure Newton & Irvine:

> " * * * Mr. Phillips attempts to read my June 5, 1963 letter as an acknowledgment by Donovan Leisure Newton & Irvine that Phillips was entitled to indemnification from Alleghany Corporation and/or IDS for Phillips' time spent in his pro se defense in Alleghany Corporation v. Kirby et al. It is clear on the face of my letter that

> it simply does not say what Mr. Phillips suggests. My sole intention was to protect a potential position on behalf of Messrs. Allan P. Kirby and Fred M. Kirby, in the event they desired at a subsequent time to apply to this Court for indemnification from Alleghany Corporation of the large legal fees and expenses they had incurred. As it turned out, the decision was later made that indemnification was inappropriate, and to the best of my knowledge no such application ever was made by or on behalf of the Messrs. Kirby. A copy of my letter was sent to Mr. Phillips because he was representing himself in that action, just as copies were sent to counsel for other parties to the action." *

26. Thus 12 years after the MEMORANDUM representations of June 21, 1962 that "Randolph Phillips" was entitled to an "order granting" him "expenses, including reasonable attorneys' fees" , signed by Roy W. McDonald, of Donovan Leisure Newton & Irvine, Chief Counsel to the Kirby defendants, and his associate Walter L. Stratton,** and 11 years after Loeffler's June 5, 1963 letter confirmation of that fact to this Court, he in a patently false affidavit seeks to deny the most obvious and plain meaning of it. In that June 5, 1963 letter, he explicitly and without qualification states: "Defendants have certain rights to indemnification and reimbursement under the By-Laws of Alleghany Corporation and the statutes of New York and Maryland * * * the defendants would be entitled to assert those rights either by independent action or by application to this Court * * * ." (par. 23, supra). He did not say in 1963 nor did Chief Counsel McDonald in 1962 that "defendants (other than Randolph Phillips)" but clearly stated and intended the contrary.

27. In addition, Roy W. McDonald as the Chief Counsel in charge of the defense for the Donovan firm set the firm's policy.

---

* Loeffler failed to disclose that, without notice to Phillips, the Donovan law firm applied on behalf of its Kirby clients for approval of a bill of costs, excluding attorneys' fees, in 60 Civil 3511, and on December 19, 1966 a Bill of Costs was taxed against Alleghany Corporation in the amount of $44,031.68 and added to the June 5, 1963 judgment.

** Stratton is still a member of the Donovan law firm

28. I submit that on the above evidence alone, of which Mr. Bond, the attorney of record herein, has known or should have known prior to signing the ANSWER on behalf of Donovan Leisure Newton & Irvine, General Counsel for IDS and his employer herein (although the ANSWER is signed by Mr. Bond as a member of Marshall, Allison, Greene & Tucker), that in denying that I, Randolph Phillips, am entitled under New York law to an "order granting(me) * * * expenses, including attorneys' fees, incurred in (the) defense" of the Murchison-Alleghany action, said ANSWER was not signed "to the best of" IDS attorney Richard L. Bond's "knowledge, information and belief" and had not "good ground to support it" but was "sham and false." (Rule 11, F. R. C. P.)

II. The lack of "good ground" (Rule 11, F. R. C. P.) by IDS counsel for denying in its ANSWER that plaintiff is entitled to an order of this Court granting him "expenses, including reasonable attorneys' fees" incurred in his defense of the Murchison and Alleghany complaints, pursuant to the law of the State of Minnesota.

29. Plaintiff's claim under Minnesota law is alleged in COUNT III of the amended complaint and denied in the ANSWER of IDS in paragraphs 31 to 35, inclusive.

30. The basis of this denial in the ANSWER is shown in the Memorandum of IDS, written and signed by Mr. Bond, dated December 19, 1974 "in support of its motion to dismiss and/or for Summary Judgment", at pp. 10-12.

31. At page 10 thereof, attorney Bond states:

> "The Minnesota indemnification statute applicable to this action is Minn. Stat. s 301.09(7), enacted in 1951 and in force until 1969. * * *
>
> "The Minnesota statute is, by its terms, permissive, not mandatory. IDS, choosing not to exercise the power granted by the statute, had no by-law provision providing for indemnification (Exhibit 'E' to Bond affidavit). Consequently, Phillips has no right of indemnification against IDS predicated upon the Minnesota statute."

32. If the IDS ANSWER had in fact been based on "the best of" attorney Bond's "knowledge, information and belief" it should have been based on the fact that the 1951 Minnesota statute was replaced by the 1969 Minnesota indemnification statute (Minn. Stat. s 301.95) which is retroactive by reason of its investing with the right of indemnification "any person who was... a party to any... completed action... wherever brought... by reason of the fact that he... was a director, officer, employee, or agent of the corporation..." (Minn. Stat. s 301.95, subd. 2). And attorney Bond must also have known that said person "shall be indemnified against expenses, including attorneys' fees, actually and reasonably incurred by him in connection therewith." (Id., Subd. 3).

33. The IDS ANSWER in pleading a "FOURTH AFFIRMATIVE DEFENSE" in paragraph 64 states in pertinent part:

> "64. There is no basis under the applicable statutes of Minnesota, the State of incorporation of IDS, or under the applicable statutes of New York, the State where the actions described in paragraph 4 of the amended complaint were brought and determined, for compelling the payment to plaintiff of compensation for time he allegedly spent in defending himself in the actions described in paragraph 4 of the amended complaint."

34. We have already shown in paragraphs 7 through 28 above the falsity of this ANSWER in respect to the New York statute, based on the representations of attorneys Roy W. McDonald, Walter L. Stratton

and Robert M. Loeffler of Donovan Leisure Newton & Irvine in 1962 and 1963; and paragraph 32 above shows the falsity of the representation that "There is no basis under the applicable statute of Minnesota * * * for compelling the payment to plaintiff of compensation for time he allegedly spent in defending himself in the actions described in paragraph 4 of the amended complaint."

35. Thus attorney Bond has pleaded on the basis of the 1951 Minnesota indemnification statute which if using "the best of his knowledge, information and belief", as required by Rule 11, he must have known was replaced by the 1969 statute which is both retroactive so as to apply to this "completed action" and which is mandatory. * That his ANSWER is based on the suppression of his "knowledge, information and belief" with respect to the 1969 statute is shown by his above-quoted reference in paragraph 31 to the 1951 statute as "applicable to this action" which "by its terms is permissive."

36. Clearly attorney Bond did not have "good ground" for pleading paragraph 64 of the FOURTH AFFIRMATIVE DEFENSE.

37. IDS is a corporation managing some $8 billion in assets and with a large legal staff in its home office in Minneapolis, as well as having as its General Counsel the law firm of Donovan Leisure Newton & Irvine. It is unthinkable that attorney Bond, with the advantage of these huge legal resources did not have

---

* The 1969 Minnesota statute, which is now in effect, further provides:

> "Subd. 6. The indemnification provided by this section shall continue as to a person who has ceased to be a director, officer, employee, or agent and shall inure to to the benefit of the heirs, executors and administrators of such a person."

the "knowledge, information and belief" that the 1969 Minnesota statute existed and was "applicable" to this action. Clearly, he lacked "good ground" to plead in the ANSWER of IDS paragraph 64 of the FOURTH AFFIRMATIVE DEFENSE.

III. In pleading under the THIRD AFFIRMATIVE DEFENSE of the IDS ANSWER that "Count II in Murchison, et al. v. Kirby, et al. (S. D. N. Y., 60 Civ. 3511) was not prosecuted at any time after May, 1961", attorney Bond failed so to do "to the best of his knowledge, information and belief" and lacked "good ground" so to do. (Rule 11).

38. The pending motion of IDS to dismiss and/or for summary judgment makes clear that the basis of this allegation in paragraph 56 of the THIRD AFFIRMATIVE, is to eliminate any reimbursable time period for plaintiff on the strength of an affidavit by Stuart N. Updike sworn to in New York State Supreme Court on October 28, 1964. (IDS Memo., dated December 19, 1974, pp. 19-20).

39. The Updike affidavit as quoted by attorney Bond stated:

> "22. Count II was actively defended by petitioner (Phillips) and the other defendants in Alleghany v. Kirby until it became moot in April of 1961 by petitioner's decision not to run for re-election as a director of IDS. Subsequent to May, 1961, therefore, no discovery or any proceeding in Alleghany v. Kirby was conducted with respect to Count II and the claim therein relating to petitioner's conduct as a director of IDS was formally dropped from the complaint when respondent (Alleghany) took over the prosecution of said action in June, 1962."

40. Attorney Bond, contrary to his duty under Rule 11, made no independent inquiry to verify the accuracy of this affidavit representation of Updike, who was one of adversary counsel for the Murchison-Alleghany plaintiffs in 60 Civil 3511.

41. The statements that (i) "Count II * * * became moot in April of 1961" ; (ii) that "subsequent to May 1961, therefore, no discovery or any proceeding in Alleghany v. Kirby was conducted with respect to Count II" ; and (iii) "the claim therein relating to petitioner's (Phillips) conduct as a director of IDS was formally dropped from the complaint when respondent (Alleghany) took over the prosecution of said action" were each made in an attempt to reduce Phillips' reimbursable time in defending himself as an IDS director.

42. Each and every one of the above 3 statements are false, as attorney Bond could have readily ascertained for himself had he examined the record so as to discharge to this Court his professional obligation to plead the ANSWER herein "to the best of his knowledge, information and belief."

43. That Count II did not "become moot in April of 1961 by petitioner (Phillips) decision not to run for re-election as a director of IDS" is shown by the June 21, 1962 MEMORANDUM of Donovan Leisure Newton & Irvine which refers to an affidavit of its partner Roy W. McDonald sworn to June 21, 1962 taking "the position that Mr. Updike is mistaken in his view that Count II is moot * * *." MEMORANDUM, p. 4.

44. Leaving aside the ethical question whether Mr. Bond as an attorney is bound to represent the viewpoint in the litigation of the law firm that retained him, or may instead adopt that of its adversary, the fact is that in view of this conflict he could not honestly certify, as required by Rule 11, that his pleading on this issue was "to the best of his knowledge, information and belief" and with "good ground".

45. The record upholds Mr. McDonald's representation as an attorney and not Mr. Updike's. (See par. 10 of this affidavit setting

forth seven items (h) through (n) "Under the Second Count", only the first of which (h) and the fourth (k) could conceivably have been made "moot in April of 1961 by petitioner's (Phillips) decision not to run for re-election as a director of IDS." The other items all sound in damages , including recovery of Phillips' "salary or other compensation" amounting to $30,000 annually according to paragraph 62, subparagraph (d) of the Complaint. (Bond affidavit, sworn to December 20,1974, Exhibit C, par. 62).

46. Had attorney Bond certified the ANSWER to "the best of his knowledge, information and belief" that there was "good ground" for alleging that "Count II in Murchison et al. v. Kirby et al. (S. D. N. Y. . 60 Civ. 3511) was not prosecuted at any time after May, 1961" (ANSWER, par. 56), he could only have done so on the basis of an inspection of the record after that date.

47. I hereby allege that attorney Bond did not inspect the record in the Murchison action for the period of time from April, 1961 to the dropping of Count II in the amended and supplemental complaint that Judge Dawson permitted to be filed on December 18, 1962. (See Alleghany Corporation v. Kirby et al., 218 F. Supp. at 167)

48. Had attorney Bond thus properly discharged his professional duty to this Court under Rule 11, he would have seen an affidavit sworn to on March 30, 1962 by J. Howard Carter, the partner in charge of the case for the Updike firm, stating in pertinent part:

"J. HOWARD CARTER, being duly sworn, says:

1. I am a member of the firm of Townley, Updike, Carter & Rodgers, attorneys for plaintiffs herein. I have been in charge of this matter since its inception and am completely familiar with the facts, circumstances and proceedings to date.

* * * * *

9. In paragraph 11, "in the interests of brevity", the moving affidavit fails to assert the extended testimony adduced with respect to the events in Alleghany and IDS subsequent to December 1959 which are relvant and material to the issues of this law suit. Moreover, it, in noting Mr. Eppler's break with Kirby, completely fails to call attention to the advent of Randolph Phillips on the Board of IDS and his destructive activities on the Finance and Law Committees of IDS. These matters are pleaded in the complaint and a mass of documentary materials has been adduced in support of the allegations of the complaint with respect to the activities of Phillips, Ireland and Kirby during the spring and summer of 1960. The moving affidavit wholly fails in paragraph 11 to recite the course of events that led Mr. Eppler to take a strong and proper stand against Mr. Kirby's support of Phillips and Ireland's program in IDS, thus leading to a break between Mr. Kirby and Mr. Eppler."

49. Thus instead of discovery having been ended on Count II by April, 1961, the affidavit of Updike's partner in this federal court shows the then current Eppler deposition on the Count II charges (as well as Count I) was in vigorous litigation on March 30, 1962.

Since "the events in... IDS subsequent to December 1959", namely "the advent of Randolph Phillips on the Board of IDS and his destructive activities on the Finance and Law Committees of IDS" were "relevant and material to the issues of this law suit" on March 30, 1962, Updike's affidavit that all these issues in Count II "became moot in April of 1961 by petitioner's decision not to run for re-election as a director of IDS" (IDS Memo., pp. 19-20) was plainly false.

50. Plainly attorney Bond lacked "good ground" to allege in the ANSWER of IDS the THIRD AFFIRMATIVE DEFENSE based on paragraph 56 thereof, a fact he would have readily discovered had he to "the best of his knowledge, information and belief" with respect to the Murchison record actually have read that record. Instead he relied on the Updike affidavit whose falsity he could have discovered had he made any attempt to verify it, as he was bound by the standards of Rule 11 to do.

IV. Prior to signing the ANSWER herein attorney Bond at no time read the record in the file of the Murchison and Alleghany cases (60 Civ. 3511, S. D. N. Y.) upon which plaintiff's claims are based and thus his signature to said ANSWER does not constitute a certificate, as required by Rule 11, that there is "good ground" for the ANSWER to "the best of his knowledge, information, and belief.

51. In a telephone call I made to attorney Bond on January 13, 1975 I asked him if he had a copy of or had read the record in 60 Civil 3511. He replied in the negative to each question. I also asked him if he would provide for my having access to the record at the Donovan law firm. He promised to let me know. I had not heard from him by January 15th and called him again but he did not answer the phone nor call me back.

V. In denying "knowledge or information sufficient to form a belief as to the truth" of the allegations in paragraph 21 of the amended complaint (ANSWER, par. 21), attorney Bond failed to make any investigation thereof whatsoever or to attempt to verify the schedule showing that Phillips expended 1,893 hours of time defending himself as attorney pro se, although he has had a copy of said schedule for more than 2 years and could have verified its accuracy from the records of the Donovan law firm, since the days in question were also provided.

52. Plaintiff submits that such negligence is incompatible with the duty and obligation of an officer of this Court. Certainly an attorney may not avoid the duty imposed upon him by Rule 11 by neglecting to investigate the essential elements of a claim made against his client.

WHEREFORE, plaintiff Randolph Phillips respectively moves this Honorable Court for an order, pursuant to Rule 11 of the Federal Rules of Civil Procedure, striking the ANSWER of defendant Investors Diversified Services, Inc. as "sham and false" in violation of said Rule.

RANDOLPH PHILLIPS

Affirmed to before me this

17th day of January, 1975.

JOHN W. STRAYER
Notary Public, State of New York
No. 24-4502943
Qualified in Kings County
Commission Expires March 30, 1975

76

Filed on 9/26/74

UNITED STATES DISTRICT COURT
FOR SOUTHERN DISTRICT OF NEW YORK

RANDOLPH PHILLIPS,

Plaintiff,

72 Civil 1544 (CHT)

-against-

AMENDED NOTICE of APPEAL

INVESTORS DIVERSIFIED SERVICES, INC.
and ALLEGHANY CORPORATION,

Defendants.

Notice is hereby given that Randolph Phillips, plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the order dated August 28, 1974 and entered herein on August 30, 1974 denying plaintiff's motion pursuant to Rule 60(b)(4), F.R.Civ.P. for an order vacating as "null" and "void" for lack of jurisdiction the orders herein of the District Court dated and filed June 15, 1972 and September 25, 1972, including the orders denying vacatur thereof on reargument; and directing the further prosecution of this action and proceedings therein.

RANDOLPH PHILLIPS
Plaintiff Pro Se
30 East 72nd Street
New York, N.Y. 10021
734 6776

TO: Clerk, United States District Court
Southern District of New York

Richard L. Bond, Esq.
Marshall Bratter Green Tucker
& Allison
430 Park Avenue
New York, N.Y. 10022

86C

54

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U. S. DISTRICT COURT
FILED
DEC 10 1974
S. D. OF N. Y.

RANDOLPH PHILLIPS, Plaintiff,	
-against-	72 Civ. 1544 (CHT)
INVESTORS DIVERSIFIED SERVICES, INC. and ALLEGHANY CORPORATION, Defendants.	STIPULATION

IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned, subject to the approval of the Court, that:

1. Defendant Investors Diversified Services, Inc. consents to the amendment of plaintiff's complaint as reflected in the Amended Complaint served by plaintiff on November 18, 1974.

2. All claims against defendants contained in plaintiff's original complaint herein which arise out of alleged agreements, acts, transactions or occurrences not contained in plaintiff's Amended Complaint shall be and are dismissed with prejudice.

3. The application made herein by defendant Alleghany Corporation, dated June 30, 1972, for imposition of costs and attorneys' fees against plaintiff pursuant to an opinion and order dated June 15, 1972, shall be and is withdrawn with prejudice.

4. The time within which defendant Investors Diversified Services, Inc. may move with respect to or answer

MICROFILM
DEC 10 1974

day of , 19

plaintiff's Amended Complaint shall be extended to and including December 20, 1974.

Dated: New York, New York
December 6, 1974

RANDOLPH PHILLIPS

Plaintiff Pro Se
30 East 72nd Street
New York, New York 10021

MARSHALL, BRATTER, GREENE,
ALLISON & TUCKER

By

A Member of the Firm
Attorneys for Defendants
430 Park Avenue
New York, New York 10022

Dec 9, 1974

SO ORDERED:

U.S.D.J.

day of , 19 .

98

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - x

RANDOLPH PHILLIPS, :

Plaintiff, :

-against- : 72 Civ. 1544 (CHT)

INVESTORS DIVERSIFIED SERVICES, INC., : NOTICE OF MOTION

Defendant. :

- - - - - - - - - - - - - - - - - - x

PLEASE TAKE NOTICE that, upon the annexed affidavit of Richard L. Bond, dated December 20, 1974, and the exhibits thereto, defendant Investors Diversified Services, Inc. will move this Court, on the 10th day of January, 1975, at 10:00 A.M., in Room 1904, United States Court House, Foley Square, New York, New York, for an order pursuant to Rules 12(b)(6) and 56(b) of the Federal Rules of Civil Procedure, dismissing plaintiff's amended complaint on the ground that it fails to state a claim upon which relief may be granted and/or granting summary judgment in favor of defendant with respect to each of the purported claims contained in plaintiff's amended complaint.

Dated: New York, New York
December 20, 1974

MARSHALL, BRATTER, GREENE,
ALLISON & TUCKER

By Richard L. Bond
A Member of the Firm
Attorneys for Defendant
Investors Diversified Services, Inc.
430 Park Avenue
New York, New York 10022
212 421-7200

TO:

MR. RANDOLPH PHILLIPS
Plaintiff Pro Se
30 East 72nd Street
New York, New York 10021

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - x

RANDOLPH PHILLIPS, :

Plaintiff, :

-against- : 72 Civ. 1544 (CHT)

INVESTORS DIVERSIFIED : **AFFIDAVIT**
SERVICES, INC.,
:
Defendant.
:
- - - - - - - - - - - - - - - - - x

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

RICHARD L. BOND, being duly sworn, deposes and says:

1. I am a member of Marshall, Bratter, Greene, Allison & Tucker, attorneys herein for defendant Investors Diversified Services, Inc. ("IDS"). This affidavit is made in support of a motion by IDS, pursuant to Rules 12(b)(6) and 56(b) of the Federal Rules of Civil Procedure, to dismiss plaintiff's amended complaint and/or for summary judgment in favor of IDS with respect to the claims therein.

Nature of the Action

2. Plaintiff Randolph Phillips ("Phillips") commenced this action in April 1972, seeking recovery of $94,950, plus interest, from Alleghany Corporation or from IDS as compensation for time he allegedly spent in his *pro se* defense of *Alleghany Corporation* v. *Kirby, et al.* (S.D.N.Y., 60 Civ. 3511).

3. Alleghany Corporation was dismissed from this action in 1972, because of lack of diversity jurisdiction. Phillips filed an amended complaint in November 1974, which dropped certain of the purported claims asserted in his original complaint.

4. Plaintiff's amended complaint is annexed as Exhibit A. Although Phillips is not and was not a lawyer, he seeks compensation, on a variety of theories, for the equivalent of legal fees. IDS served its answer to the amended complaint on December 20, 1974 (Exhibit B hereto). Much of the factual background upon which plaintiff bases his purported claims is not disputed; however, the answer asserts on numerous grounds that plaintiff has no claim against IDS.

5. The factual basis for Phillips' claims is that he spent an estimated 1,899 hours defending himself during the period September 8, 1960, when Alleghany v. Kirby was commenced, through June 5, 1963, when Alleghany v. Kirby was finally dismissed as to Phillips (see 218 F.Supp. 164). He seeks compensation at the rate of $60.00 per hour for his pro se defense, and contends that he was sued in Alleghany v. Kirby as a director and Chairman of the Finance & Law Committee of IDS' Board. Copies of the original complaint, filed in September 1960, and of the amended and supplemental complaint served on December 18, 1962, in Alleghany v. Kirby are respectively Exhibits C and D hereto.

6. As shown by the annexed copy of a November 4, 1974 affidavit by Joseph F. Grinnell, Esq., Vice President and General Counsel of IDS (Exhibit E hereto), Mr. Phillips was a director of IDS from April 19, 1960 to April 25, 1961; was

Chairman of the Finance & Law Committee of the IDS Board of Directors from June 22, 1960 to May 31, 1961; and was paid $2,500 per month by IDS, plus office space, secretarial and clerical help and reasonable expenses, for his "full time services" as Chairman of the Finance & Law Committee. The original of Mr. Grinnell's affidavit is on file herein as part of the papers in opposition to plaintiff's summary judgment motion, dated October 18, 1974, which was mooted by plaintiff's service of an amended complaint.

7. Annexed as Exhibit F hereto is a copy of an affidavit, dated October 28, 1964, by Stuart N. Updike, Esq. Mr. Updike was plaintiff's counsel in Alleghany v. Kirby. His affidavit, filed in another action described below, points out that (¶¶25-27) Phillips was receiving compensation from IDS and from Alleghany Corporation at a rate of $50,000.00 per year during the entire period that any claim was prosecuted in Alleghany v. Kirby which related to Phillips' service as an IDS director.

8. Plaintiff's amended complaint attempts to assert claims for compensation for his pro se time spent in Alleghany v. Kirby based upon the New York or Minnesota indemnification statutes, the common law, and purported threatened violations of the equal protection and due process clauses of the Fourteenth and Fifth Amendments to the United States Constitution.

9. As shown by the accompanying memorandum in support of this motion, the Minnesota indemnification statute in effect since 1951 and throughout the period relevant to plaintiff's claims made indemnification of corporate directors

and officers wholly voluntary on the part of the corporation. The Grinnell affidavit (¶6 of Exhibit E) demonstrates that IDS had no by-law providing for indemnification rights.

10. The New York statute in effect during the relevant period is contained in Section 64 of Article 6A of the New York General Corporation Law, which authorizes indemnification of "reasonable expenses . . . actually and necessarily incurred" under circumstances specified in the statute. The applicable Minnesota statute similarly speaks in terms of "expenses . . . reasonably incurred," Minn. Stat. §301.09(7). It is defendant's position that these indemnification statutes in terms are limited to reimbursement for expenses incurred, and that Phillips' attempt to be compensated for his own pro se time is not within the indemnification statutes.

11. A further barrier to Phillips' claim is whether he can be paid, as though he were a member of the bar, for the equivalent of legal fees. We urge that he cannot.

12. Section 64 of the New York General Corporation Law authorizes indemnification of "any person made a party to any action . . . by reason of the fact that he . . . is or was a director, officer or employee of a corporation . . . ." The record in Alleghany Corporation v. Kirby and related court documents supports the conclusion that, subsequent to April 1961, no claim was prosecuted against Phillips "by reason of the fact that he . . . is or was a director, officer or employee" of IDS. Judge Dawson's opinion in Alleghany Corporation v. Kirby, 218 F.Supp. at 176, stated that only one of the three issues in that litigation involved Phillips; and that the issue

involving Phillips was presented in ¶44 of the amended and supplemental complaint (Exhibit D hereto), which is substantially the same as ¶41 of the original complaint (Exhibit C hereto). Examination of ¶44 of Exhibit D makes plain that Phillips' conduct in 1959, prior to his becoming an IDS director in April 1960, was attacked in Alleghany Corporation v. Kirby, and Judge Dawson's statement of the issues confirms that view. Phillips' defense of these charges was not "by reason of the fact that he . . . is or was a director" of IDS within the New York indemnification statute. Although one of the claims in the original complaint in Alleghany Corporation v. Kirby (Exhibit C, Count II) charged improper acts by Phillips as an IDS director, the record in that action shows that this claim was formally abandoned by the filing of the amended and supplemental complaint (Exhibit D) and in fact was abandoned much earlier. An October 28, 1964 affidavit by Stuart N. Updike, Esq. (Exhibit F hereto), who was counsel for plaintiffs in Alleghany Corporation v. Kirby, filed in a State Court action infra, states that:

> "22. Count II was actively defended by petitioner [Phillips] and the other defendants in Alleghany v. Kirby until it became moot in April of 1961 by petitioner's decision not to run for re-election as a director of IDS. Subsequent to May, 1961, therefore, no discovery or any other proceeding in Alleghany v. Kirby was conducted with respect to Count II and the claim therein relating to petitioner's conduct as a director of IDS was formally dropped from the complaint when respondent [Alleghany Corporation] took over the prosecution of said action in June, 1962."

During the entire period when Count II was at issue in Alleghany Corporation v. Kirby, September 1960 to April 1961, Phillips was employed by IDS at $2,500 per month, plus expenses, and by Alleghany at $5,000 per quarter, and he was obligated to give IDS his "full-time services," if needed (Exhibit F ¶26; Exhibit E ¶3). Therefore, such of Phillips' claim herein as arguably comes within the indemnification statute -- assuming other barriers are overcome -- was for the time expended by Phillips when he was being compensated by defendants at the rate of $50,000 per year, and he plainly incurred no expenses for which he was not compensated.

13. Finally, Phillips' claim for indemnification under Section 64 of the New York General Corporation Law was brought nearly nine years after the claim accrued and is barred by limitations.

14. Phillips has made numerous unsuccessful attempts over a period of years to obtain payment from Alleghany Corporation for the time he spent in Alleghany v. Kirby. The Updike affidavit (Exhibit F) states that Phillips filed an application in Alleghany v. Kirby in December 1963, which was rejected by Judge Dawson for lack of proof of service or a return date for Phillips' motion. Phillips renewed his application in Alleghany v. Kirby on September 24, 1964, but withdrew that application on October 13, 1964 (Exhibit F, ¶¶7-9). Phillips tried again on October 13,1964, this time by commencing an action against Alleghany Corporation in Supreme Court, New York County, Index No. 15360/1964 (Id. at ¶10), and that action was dismissed for want of subject matter jurisdiction by order filed January 8, 1965. Phillips once again sued

Alleghany in the State Court in 1965, seeking recovery, *inter alia*, on different legal theories for the same time spent in his *pro se* defense, and this action was dismissed on the merits by order entered and filed on June 6, 1966 (Sup.Ct., N.Y.Co., Index No. 12788/1965). Finally, Phillips commenced the instant action in April 1972, against both Alleghany Corporation and IDS.

15. It is respectfully urged that plaintiff has asserted no claim in his amended complaint as to which there is any genuine possibility that relief can be granted. Any claim plaintiff may have had arose more than eleven years ago; it is time that this litigation ended.

Richard L. Bond
Richard L. Bond

Sworn to before me this
20th day of December, 1974.

Beverly Sue Collier
Notary Public

BEVERLY SUE COLLIER
Notary Public, State of New York
No. 31-[illegible]
Qualified in New York County
Commission Expires March 30, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - x

RANDOLPH PHILLIPS,

Plaintiff,

-against-

INVESTORS DIVERSIFIED SERVICES, INC. and ALLEGHANY CORPORATION,

Defendants.

- - - - - - - - - - - - - - - - - - x

Exhibit E

72 Civ. 1544 (CHT)

AFFIDAVIT

STATE OF MINNESOTA)
COUNTY OF HENNEPIN) ss.:

JOSEPH F. GRINNELL, being duly sworn, deposes and says:

1. I am an attorney at law admitted to practice in the State of Minnesota. I was Assistant General Counsel of Investors Diversified Services, Inc. ("IDS") from August 6, 1959 to September 1, 1962, General Counsel from September 1, 1962 to January 1, 1970, and Vice President and General Counsel from January 1, 1970 to the present. This affidavit is made in opposition to a motion by plaintiff Randolph Phillips ("Phillips") for summary judgment against IDS in the above-entitled action.

2. The books and records of IDS reflect that Phillips was elected a director on April 19, 1960, and served as a director until April 25, 1961.

3. The minutes of the IDS Board of Directors reflect that on June 22, 1960, the Board appointed

"Messrs, Charles T. Ireland, Jr., Fred M. Kirby and Randolph Phillips a special committee of the Board to be known as the Finance and Law Committee, and including the President of the Company as an ex-officio member thereof . . .". They further reflect that, at a meeting of the IDS Board of Directors on July 9, 1960, the following resolution was adopted:

> "WHEREAS, The activities of the Committee on Finance & Law of the Corporation have required the full time services of the Chairman of that Committee, and
>
> "WHEREAS, In view of the extensive studies now being undertaken by said Committee on Finance & Law, it is anticipated that the full time services of its Chairman will be required for an indefinite period of time, and
>
> "WHEREAS, The Board of Directors of this Corporation deems it in the best interest of the Corporation that the studies of the said Committee be continued until completion, and recognizes that the Chairman of said Committee should receive appropriate compensation for the time spent by him in the performance of his duties as such Chairman, and that adequate facilities should be provided to enable him to effectively perform his duties, it is
>
> "RESOLVED, That the Chairman of the Committee on Finance & Law of the Corporation, Randolph Phillips, shall receive compensation at the rate of $2,500 per month commencing July 9, 1960 during the period of time while he shall be actively engaged in the discharge of his duties as such Chairman, and

> "RESOLVED FURTHER, That Randolph Phillips be provided with appropriate office space, secretarial and clerical help and that he be reimbursed by the Corporation for his reasonable expenses incurred in connection with the discharge of his duties as such Chairman."

The minutes of a meeting of the Board on May 9, 1961, reflect that Phillips' position as Chairman of the Finance and Law Committee was terminated on that date, effective May 31, 1961.

4. In the normal course of my duties as General Counsel of IDS, if there had been an agreement made in 1964 of the kind alleged by Phillips herein, it customarily would have been brought to my attention. This is particularly true with respect to any agreement for compensation in connection with litigation. I never was told that any agreement had been made by or on behalf of IDS to compensate Phillips for the time he spent in defending himself in Alleghany Corporation v. Kirby, et al. (60 Civ. 3511) or any other similar matter. Moreover, I have caused a review of the books and records of IDS to be made to determine whether there is any indication of such an agreement to compensate Phillips, and nothing has been found of any kind reflecting such a purported agreement.

5. The first time that I ever heard of any claim by Phillips against IDS for compensation for Phillips' time spent defending himself in Alleghany v. Kirby and related cases was after Phillips sent his June 16, 1970 letter asserting such a claim.

6. During the period 1960 through 1964, the by-laws of IDS did not contain any provision for indemnification of directors, officers or employees of IDS.

Joseph F. Grannell

Joseph F. Grannell

Sworn to before me this
4th day of November, 1974.

Notary Public

VELMA MURPHY
Notary Public, Hennepin County, Minn.
My Commission Expires Nov. 20, 1975.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Exhibit F

- - - - - - - - - - - - - - - - - - - x

RANDOLPH PHILLIPS, :

Petitioner, :

- against - :

ALLEGHANY CORPORATION, :

Respondent. :

- - - - - - - - - - - - - - - - - - - x

Index No. 15360/1964

AFFIDAVIT OF STUART N. UPDIKE

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

STUART N. UPDIKE, being duly sworn, says:

1. I am an attorney admitted to practice before the courts of the State of New York as well as the United States District Court for the Southern District of New York. I am a member of the firm of Townley, Updike, Carter & Rodgers, attorneys for respondent Alleghany Corporation, and am fully familiar with the facts here involved. I was in charge of the representation of Alleghany on the two previous motions petitioner has made in the Federal Court for the relief he now seeks from this Court.

2. Petitioner is seeking an order directing respondent to pay the "reasonable and necessary expenses," incurred in defending himself in three actions brought by or on behalf of respondent. Such "expenses," however, consist exclusively of a charge for the time petitioner himself spent in his own defense. Petitioner, who is not a lawyer, appeared pro se in each of these actions. Two were brought in the United States District Court, Southern District of New York. The third was brought in this Court.

3. I make this affidavit in support of Alleghany's motion to dismiss the amended petition upon the ground that this Court is without jurisdiction of this special proceeding, or in the alternative, upon the ground that petitioner has failed to state a cause of action.

The Three Actions

4. Alleghany Corporation v. Kirby, et al., S.D.N.Y., 60 Civ. 3511, is the first of the actions which give rise to Mr. Phillips' present claim. Respondent alleged therein that Mr. Phillips had participated in a fraudulent settlement of prior derivative actions brought on behalf of Alleghany. Petitioner successfully defended the claim of fraud, and judgment dismissing the action as to him became final on July 5, 1963. Although an appeal from the judgment of dismissal against the other defendants is presently before the United States Court of Appeals for the Second Circuit on rehearing en banc, no appeal was taken from the judgment as to petitioner. The appeal does not involve the claim of fraud made against petitioner.

5. The second action, Freeman v. Kirby, S.D.N.Y., 60 Civ. 3502 (hereafter "Freeman (Federal)"), was a derivative action which contained allegations of a fraudulent settlement similar to the allegations in Alleghany v. Kirby. It was dismissed (27 F.R.D. 395) on April 6, 1961. An appeal from such dismissal was noticed but not prosecuted. The action was dismissed finally on October 23, 1961.

6. The third action, Freeman v. Kirby, Sup. Ct. N.Y. Co., Index No. 13114/1960 (hereafter "Freeman (State)"), was a

derivative action paralleling the Federal Court action described in the preceding paragraph. It was dismissed as to petitioner on August 10, 1964.

Petitioner's Previous Motions For Identical Relief

7. The present amended petition reveals only one of the two previous motions for identical relief in the Federal Court. Disposition of both is unexplained by petitioner except for the note that one was withdrawn by consent.

(a) On December 12, 1963, petitioner filed with Judge Dawson, as trial judge in Alleghany v. Kirby, a motion demanding that Alleghany pay petitioner $94,950 (the exact sum demanded here) for his defense of that action alone. (A copy of said motion is annexed hereto as Exhibit A.) The motion in Alleghany v. Kirby was based upon the same grounds as the instant petition. On January 31, 1964, Judge Dawson returned petitioner's papers by mail stating:

> "There was no proof of service of the notice of motion and, apparently, no date set for return of the motion. There is, therefore, no motion before me and I am returning these papers to you herewith."

(b) On September 24, 1964, petitioner renewed his application in the Federal Court in Alleghany v. Kirby by serving a virtually identical set of papers upon Alleghany. (A copy of said motion is annexed hereto as Exhibit B.) (While the notice of motion in the second set of papers stated that petitioner was demanding reimbursement for his expenses for defending Alleghany v.

v. *Kirby*, his affidavit stated that the application was "intended to cover and does cover" his expenses in defending the *Freeman* (Federal) action. The amount demanded again was $94,950.)

8. Petitioner's second motion in *Alleghany* v. *Kirby* was made returnable in the regular motion part of the Federal District Court because Judge Dawson had died in August, 1964. Since the case had been assigned to Judge Dawson "for all purposes," however, a question arose as to whether or not petitioner's motion should be heard by the regular motion judge or should be sent to Chief Judge Ryan for reassignment.

9. Petitioner thereupon applied to Judge McGohey, Acting Chief Judge, on October 9, 1964, for an order directing that the motion remain before the judge assigned to motion part on October 13, 1964, the return date of the motion. Judge McGohey refused to sign that order and instructed counsel for Alleghany to advise the motion judge on the return date that it was his (Judge McGohey's) recommendation that the matter be referred to Chief Judge Ryan upon his return from vacation.

10. At that juncture Mr. Phillips stated that if the motion was not to be heard in the regular motion part on October 13, 1964, he would like to take the opportunity to improve his memorandum and requested that we consent to a withdrawal of his motion so that he would have an opportunity to do so. We agreed and on October 13, 1964, a stipulation was entered into by Mr. Phillips and this firm as attorneys for respondent, whereby Mr.

Phillips' federal court motion was withdrawn without prejudice. A copy of this stipulation (which has been filed in the federal court) is annexed hereto as Exhibit C. On that day Mr. Phillips personally served the petition under consideration here.

The Absence of a Showing of Reasonable Cause
For Not Moving in the Federal Court Actions

11. Petitioner's papers are barren of "reasonable cause for the failure to make application for such relief in the action or proceeding in which the expenses were incurred or other amounts were paid" (see General Corporation Law Section 65). He states only that Judge Dawson, the trial judge in Alleghany v. Kirby, died in August, 1964, and that Judge Bicks, the judge in Freeman (Federal), died sometime prior thereto. But Judge Dawson's death occurred some fourteen months after the judgment became final in Alleghany v. Kirby, and Judge Bicks died some eighteen months after the Freeman (Federal) complaint was dismissed. Plaintiff offers no explanation as to why his motion was not made in the Federal District Court during those months. I see no reason why his own delay can in any way be "reasonable cause" for coming into this Court to attempt to obtain reimbursement for expenses incurred, if at all, solely in defending the federal court actions.

12. Nor has petitioner shown any "reasonable cause" why the deaths of Judges Dawson and Bicks prevent his bringing his motion in federal court. This is particularly true in view of Judge McGohey's ruling of October 13, 1964. Petitioner thereby need only have waited to present his claim until Judge Ryan's return from vacation on November 4, 1964.

13. Petitioner's failure ~~to~~ explain his presence in this Court is underscored by the simple fact that he, too, recognized that the proper forum is the federal court by making his two prior applications in that Court.

14. Petitioner's amended petition now refers to the Freeman (State) action. This reference seems to be no more than a stalking horse used in an effort to avoid the federal court. Freeman (State), as I noted above, paralleled the Freeman (Federal) action. It was dormant from the time it was served and filed in 1960 until its unopposed dismissal on petitioner's motion in August, 1964. Indeed, petitioner did not bother with it until after he had made his first abortive effort to obtain a fee in Alleghany v. Kirby in December, 1963, and just prior to his second attempt for a fee in September, 1964. Certainly petitioner spent no time in defending Freeman (State) and his present reference to it is insufficient to confer jurisdiction upon this Court rather than the federal court.

15. Furthermore, petitioner's own sworn statements in the two previous motions filed in the federal court in Alleghany v. Kirby negate his present claim that he had any "expenses" at all in defending Freeman (State). Thus, petitioner's original application in the federal court was accompanied by an affidavit in which he swore that his expenses in the defense of Alleghany v. Kirby alone amounted to the $94,950 (see Exhibit A). His second affidavit stated that the $94,950 covered his expenses in both Alleghany v. Kirby and Freeman (Federal) (see Exhibit B). The present amended petition now demands exactly the same amount for the expenses of all three actions. It can only be concluded that petitioner had no expenses in the defense of Freeman (State).

16. The petition thus does not show any "reasonable cause" for failing to apply in the federal court actions where the "expenses" allegedly were incurred.

17. I believe these facts warrant dismissal of this petition without prejudice to an application by petitioner in *Alleghany* v. *Kirby* for similar relief. If, however, this Court decides it has jurisdiction, then I believe the amended petition should be dismissed on the merits. The discussion which follows is in support of this contention.

The Petition and the Claims Made Therein

18. Petitioner demands that respondent pay his "reasonable and necessary expenses in connection with his successful defense" of *Alleghany* v. *Kirby*, *Freeman* (Federal) and *Freeman* (State). His petition alleges that he is entitled to such payment by Sections 63-68 of the New York General Corporation Law and Sections 60(a) and (b) of Article 23 of the Public General Laws of Maryland; all of which relate to indemnification of corporate directors. In addition, petitioner's brief refers to some "common law" principles of agency and damages (see Br. pp. 10-11).

19. The facts alleged in support of the petition, as augmented by the "common law" claim in the brief in support thereof, are at best sketchy. Indeed, a review of the litigation which petitioner successfully defended, coupled with a review of petitioner's relationship to respondent and IDS during the pendency of such litigation, suffices to illustrate the absence

of any basis for petitioner's claim that respondent should pay him "expenses" for defending himself in such litigation. This is particularly true because petitioner does not claim that he paid any attorney for such defense. Instead, his "expenses" consist of his own time: he is simply claiming that respondent should pay him personally for his own efforts at his own defense. In sum, petitioner appears to be asserting that the indemnification statutes in question actually constitute a form of fee contract for him.

The Nature of the Litigation Petitioner Defended

20. Alleghany v. Kirby was instituted as a stockholders derivative action against petitioner and others. It contained two counts. Count I alleged that petitioner was a consultant to attorneys for plaintiffs and objectants in prior derivative litigation brought on behalf of respondent; that petitioner gained a position of substantial dominance in such litigation; and that petitioner, using his position of dominance, corruptly settled the litigation for less than its fair value, thus committing a fiduciary fraud upon respondent, its shareholders and the State and Federal Courts in which the prior derivative litigation was pending. The allegedly corrupt bargain was that in exchange for his advocacy of an inadequate settlement, petitioner would be made a director of IDS and paid a substantial salary. This bargain was alleged to have been made in October, November or December of 1959; the inadequate settlement was alleged to have

been consummated in December, 1959, and the underlying actions dismissed in February, 1960. Count I further asserted that as part of his payoff petitioner became a director of IDS on April 19, 1960, and became Chairman of its Finance and Law Committee at a salary of $30,000. The relief prayed under Count I was setting aside or nullifying the allegedly inadequate settlement; injunctive relief against petitioner's continuance as an IDS director and an accounting from petitioner for amounts he received as a consequence of his corrupt bargain.

21. Count II of the Alleghany v. Kirby complaint alleged that petitioner, as an IDS director and Chairman of its Finance and Law Committee, was carrying out a plan to secure Allan P. Kirby in control of that corporation by means of harassing and eliminating experienced personnel in the then management of IDS and otherwise disrupting its operations; all of which conduct by petitioner was alleged to have demoralized the IDS staff and adversely affected Alleghany's investment in that company.

22. Count II was actively defended by petitioner and the other defendants in Alleghany v. Kirby until it became moot in April of 1961 by petitioner's decision not to run for re-election as a director of IDS. Subsequent to May, 1961, therefore, no discovery or any other proceeding in Alleghany v. Kirby was conducted with respect to Count II and the claim therein relating to petitioner's conduct as a director of IDS was formally

dropped from the complaint when respondent took over the prosecution of said action in June, 1962.

23. Neither _Freeman_ (Federal) nor _Freeman_ (State) contained a count similar to Count II of _Alleghany_ v. _Kirby_. Moreover, as I noted above, _Freeman_ (State) was dormant at all times and _Freeman_ (Federal) was dormant after April of 1961.

24. Consequently, Count II of _Alleghany_ v. _Kirby_ was the only claim made against petitioner for his conduct as an IDS director. It required defense only in the period September, 1960, to May, 1961. At that time the firms of Donovan Leisure Newton & Irvine and Kissam & Halpin were conducting a vigorous defense of the action, including Count II, on behalf of Allan P. Kirby (petitioner's alleged co-conspirator) and respondent, respectively.

25. The other claims in _Alleghany_ v. _Kirby_ and _Freeman_ (Federal and State) were founded upon the allegedly corrupt bargain that petitioner made prior to becoming a director of IDS. These claims were prosecuted to trial in _Alleghany_ v. _Kirby_ in 1962 and 1963 and, as noted above, petitioner ultimately was successful in his defense. Significantly, for purposes of the present petition, the defense of these claims as to the allegedly corrupt bargain have nothing to do with petitionir's services as a director of IDS.

Petitioner's Relationship to Respondent and IDS in the Period September, 1960, to May, 1961

26. During the September, 1960, to May, 1961, period

in which the only claims against him arising out of his conduct as a director of IDS were pending in Count II of Alleghany v. Kirby, petitioner was being paid by IDS at an annual rate of $30,000 as Chairman of its Finance and Law Committee and by Alleghany at the annual rate of $20,000 as a consultant. In addition, I am informed and believe that IDS supplied petitioner with office space and secretarial assistance in this city and that petitioner used such office space and secretarial help in the defense of Alleghany v. Kirby.

27. It appears, therefore, that petitioner was drawing pay at the rate of $50,000 per year for serving IDS and Alleghany during the same period for which he now claims additional compensation from Alleghany for his own time spent in actively opposing and defending Count II of Alleghany v. Kirby. If the then management of Alleghany and IDS paid petitioner at the rate of $50,000 annually while he was spending his days defending an action, then certainly he has no basis for now claiming that he suffered a loss or expense indemnifiable by Alleghany for that same period.

28, Petitioner, then, is demanding what amounts to duplicate pay. He has been paid once for his services to Alleghany and IDS during the period in question. He now demands pay for defending himself during that same period, although he has not shown that he actually incurred any loss of earnings as a consequence of the time spent in defending the action against him. This is true both in the period during which he was employed by IDS and Alleghany and at all times subsequent thereto.

29. In view of the foregoing circumstances, I urge that petitioner has not incurred any legally cognizable reimbursable expenses either during the pendency of the only claim against him as an IDS director or during the pendency of *Allegheny* v. *Kirby* or *Freeman* (Federal).

30. As a matter of policy, petitioner's suggestion that the indemnification statutes or the common law sanction conversion of the right to appear *pro se* into a self-employment contract is untenable. Certainly this Court should not encourage litigants to act in their own behalf by holding out the promise of a large windfall of the kind petitioner hopes to receive here.

WHEREFORE, I respectfully request that respondent's motion to dismiss be granted for want of jurisdiction or in the alternative, for failure to state a claim.

/s/ Stuart N. Updike
STUART N. UPDIKE

Sworn to before me this
28th day of October, 1964.
/s/ Adelaide R. O'Neill
Notary Public

ADELAIDE R. O'NEILL
Notary Public, State of New York
No. 03-8221185
Qualified in Bronx County
Certificate filed in New York County
Commission Expires March 30, 1966

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - x

RANDOLPH PHILLIPS, :

Plaintiff, :

-against- : 72 Civ. 1544 (CHT)

INVESTORS DIVERSIFIED SERVICES, INC., : RULE 9(g) STATEMENT

Defendant. :

- - - - - - - - - - - - - - - - - - x

Pursuant to Rule 9(g) of the General Rules of the Court, defendant contends that no genuine issue of material fact exists to be tried with respect to the following:

1. Phillips is not and was not an attorney.
2. Phillips was not sued in Count I of the complaint or in the amended and supplemental complaint in Alleghany v. Kirby by reason of the fact that he is or was a director of IDS.
3. Phillips was employed on a full-time basis by IDS and Alleghany and received office and secretarial services from IDS during the entire period that Count II of the complaint in Alleghany v. Kirby was actively litigated.
4. Phillips did not actually or necessarily incur any expenses, including attorneys fees, in his *pro se* defense in Alleghany v. Kirby.

Dated: New York, New York
December 20, 1974

Respectfully submitted,

MARSHALL, BRATTER, GREENE,
ALLISON & TUCKER

By Richard L. Bond
A Member of the Firm

98

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - x

RANDOLPH PHILLIPS, :

Plaintiff, :

-against- : 72 Civ. 1544 (CHT)

INVESTORS DIVERSIFIED SERVICES, INC., : AFFIDAVIT

:

Defendant.

:

- - - - - - - - - - - - - - - - - - - x

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

RICHARD L. BOND, being duly sworn, deposes and says:

1. I am a member of Marshall, Bratter, Greene, Allison & Tucker, attorneys herein for defendant Investors Diversified Services, Inc. ("IDS"). This affidavit is in reply to plaintiff's opposition to IDS' motion to dismiss the amended complaint and/or for summary judgment, and in opposition to plaintiff's cross-motion for summary judgment.

2. The basic question presented by this lawsuit, commenced in 1972, is whether Phillips may collect from IDS the equivalent of legal fees for time spent during 1960-1963 in his *pro se* defense of derivative litigation initiated by shareholders of Alleghany Corporation ("*Alleghany* v. *Kirby*"), when Phillips is not a lawyer and IDS was not a party to the earlier derivative litigation.

3. IDS moved to dismiss the amended complaint, or for summary judgment, on the grounds that:

(a) Under the law of New York, the State wherein the derivative litigation was maintained and where any cause of action apparently arose, or under the law of Minnesota, the State wherein IDS was incorporated and maintains its principal place of business, Phillips has no claim upon which relief can be granted.

(b) Any claim Phillips may have had is barred by limitations, since his purported claim arose on June 5, 1963, and he did not commence this action until April, 1972.

(c) Denial of recovery to plaintiff does not, as he asserts, deny him equal protection of the laws or due process of law within the Fourteenth or Fifth Amendments to the United States Constitution.

4. Phillips responded by opposing IDS' motion and with a motion to strike IDS' answer to the amended complaint as "sham and false" and "in violation of Rule 11" of the Federal Rules of Civil Procedure. By my affidavit, dated January 24, 1975, and an accompanying legal memorandum, IDS opposed the motion to strike its answer and requested that it be awarded legal fees and expenses for reasons explained therein.

5. The various motions before the Court are intertwined: by IDS to dismiss or for summary judgment, by Phillips for summary judgment, and by Phillips to strike IDS' answer. Insofar as Phillips' positions depend upon additional purported facts, this affidavit will respond. It

---

*I am advised that IDS recently was reincorporated in Delaware.

should be considered together with my prior affidavit and annexed exhibits in support of IDS' motion and my affidavit in opposition to plaintiff's Rule 11 motion.

THE DONOVAN LEISURE "ADMISSIONS"

6. Phillips takes the position that, because of supposed admissions by Donovan Leisure Newton & Irvine in letters and filed documents in Alleghany v. Kirby, IDS is precluded from refusing payment of the attorneys' fees he now seeks, and it somehow is improper for me to oppose his claim as counsel herein for IDS. (Phillips' Opposition Aff. ¶¶1,4; Phillips' Rule 11 Aff. ¶¶4-6, 18-19, 21, 23-28, 34, 43-44; both dated January 17, 1975.)

7. The earliest Donovan Leisure document to which Phillips points is a letter dated October 5, 1960 (Ex. C* hereto), to Phillips from Roy M. McDonald, Esq., a member of Donovan Leisure and trial counsel for their clients in Alleghany v. Kirby. The letter does not even allude to attorneys' fees, and its purpose is clear on its face. In addition, Mr. McDonald's letter shows that it was written in his capacity as counsel for Messrs. Allan P. Kirby and Fred M. Kirby, both defendants in Alleghany v. Kirby, and it is difficult to conceive of how it might constitute an admission for an adverse party (Alleghany) or a non-party (IDS), who were not represented by Donovan Leisure in that action.

8. The next Donovan Leisure document to which Phillips points is a memorandum, served and filed on June 21,

---

*Exhibits annexed to my moving affidavit, dated December 20, 1974, are lettered from "A" through "F".

1962, in Alleghany v. Kirby; a copy of selected pages from this memorandum is Exhibit A to Phillips' Rule 11 affirmation. This memorandum was submitted jointly by Donovan Leisure with counsel for defendant Charles T. Ireland, Jr., and it responded to an application by the then derivative plaintiffs. Subsequent to initiation of the litigation, the Murchison brothers and their allies had won a proxy fight for control of Alleghany, and they sought to substitute Alleghany as a direct plaintiff in lieu of the shareholders who had sued derivatively on its behalf, to drop all defendants except Allan P. Kirby, Ireland and Phillips*, and to file a supplemental and amended complaint which would -- among other things -- drop Count II of the original complaint as moot. In responding, Donovan Leisure for the Messrs.Kirby,and counsel for Mr. Ireland, asked that Judge Dawson condition the dismissal of Count II of the original complaint, pursuant to Rule 41(a)(2). The full paragraph of that memorandum, of which Phillips quotes a truncated and misleading portion (Phillips' Opposition Aff., dated January 17, 1975, ¶1), reads:

> "In the case at bar, it is respectfully submitted, the dismissal of Count II should be with prejudice as to all defendants who have appeared and should be upon an order granting defendants Allan P. Kirby, Fred M. Kirby, Charles T. Ireland, Jr. and Randolph Phillips the expenses, including reasonable counsel fees, incurred in their defense to date of Count II" (Memorandum filed on 6/21/62 in 60 Civ. 3511 at pp.7-8).

---

*Defendants other than the Kirbys, Ireland and Phillips had not been served or appeared.

9. The third and last of the supposed admissions by Donovan Leisure was a June 5, 1963 letter from Robert M. Loeffler, Esq., then a Donovan Leisure partner, to the Judgment Clerk of this Court, the text of which is reproduced at paragraph 23 of Phillips' Rule 11 affirmation. Once again, it should be borne in mind that Loeffler was not representing either Alleghany or IDS in Alleghany v. Kirby and did not purport to speak for them. A copy of Mr. Loeffler's October 25, 1974 affidavit, previously filed herein, is annexed as Exhibit H. This affidavit recounts the circumstances of that letter, and states that it cannot be read and was not intended to mean what Phillips now claims. It is Mr. Loeffler's affidavit, which on its face is logical and straightforward, that Phillips incredibly asserts was "procured" by me and is "patently false" (Phillips' Rule 11 affirmation ¶¶24-26).

THE "FALSE" UPDIKE AFFIDAVIT

10. One of the grounds for IDS' summary judgment motion is that Phillips was paid by IDS for his "full-time services" from September 1960 to April 1961; that he additionally was paid by Alleghany during the same period; and that the only claim against Phillips in Alleghany v. Kirby which even arguably comes within the indemnification statute was not prosecuted after that time. (See ¶12 of my moving affidavit and exhibits referred to therein.)

11. Phillips has not denied the foregoing, except with respect to whether claims against him qua director of IDS ceased to be litigated after April 1961. With respect to the October 28, 1964 affidavit by Stuart N. Updike, Esq., a member of Townley, Updike, Carter & Rogers -- the firm which represented plaintiffs in Alleghany v. Kirby (Ex. F. to my moving affidavit), Phillips responds that Updike's "statements are false" (Phillips' Rule 11 affirmation ¶42), when they say

that claims against Phillips qua director became moot in April, 1961. Phillips then challenges my ethics for relying upon the Updike affidavit and distorts a telephone conversation we had on January 15, 1975 (Id. at ¶51).

12. The Updike affidavit, made a year after trial of Alleghany v. Kirby by counsel for plaintiffs therein, patently was a reasonable source upon which to rely. When Phillips spoke with me by telephone, I told him that I had not read the entire record in Alleghany v. Kirby and did not have the entire record; but that I never had seen anything to suggest that the Updike affidavit was inaccurate, and was unwilling to assume -- as Phillips suggested -- that Mr. Updike would lie simply because he opposed Phillips in litigation. I further pointed out that, as Mr. Phillips well knew, the complete record in Alleghany v. Kirby covered tens of thousands of pages -- and that if he knew of something specific to suggest that Updike was wrong, he should tell me what that was.

13. In fact, there are further reasons to assume the reliability of the Updike affidavit. It was filed in Phillips v. Alleghany Corporation (Sup. Ct., N.Y.Co., Index No. 15360/1964), wherein Phillips sought recovery from Alleghany alone of the same attorneys' fees he sought eight years later from both Alleghany and IDS in the instant action. My examination of the record in that State Court case, which was later dismissed on jurisdictional grounds, showed no denial by Phillips of Mr. Updike's statements. Moreover, since the thrust of Count II in Alleghany v. Kirby was a challenge to the propriety of Phillips' continuing conduct as an IDS director after he went on the Board in April 1960, the fact that

Phillips ceased to be a director in April 1961, lent verisimilitude to Mr. Updike's statements.

14. Phillips has come forward with bits and pieces from Alleghany v. Kirby, without benefit of their context, in an effort to support his contention that Mr. Updike perjured himself. They ignore a fundamental point, which seems apparent from reading the original complaint and supplemental and amended complaint in Alleghany v. Kirby (Exs. C and D to my moving affidavit). Phillips was charged in Count I of Alleghany v. Kirby with fostering an unduly cheap settlement for Allan P. Kirby of the Zenn litigation, in violation of Phillips' obligations to Alleghany and the plaintiff class, in return for a position of importance with Alleghany or IDS; as part of Count I, it was contended that the pay-off to Phillips later came in the form of a position on the IDS Board. Thus, the focus of Count I was a "corrupt bargain" made in 1959, with receipt by Phillips of the allegedly improper fruits in 1960. Count II, on the other hand, directly challenged Phillips' conduct qua director of IDS. It is the position of IDS on this motion, which we urge is well supported in its moving memorandum, that indemnification under the applicable New York statute and case law does not encompass defense of charges which did not arise from service as a director, and Count I of Alleghany v. Kirby arose from an allegedly corrupt bargain made well before Phillips went on the IDS Board. Therefore, it is of no aid to Phillips' position to point to places in the Alleghany v. Kirby record

compiled after April 1961 wherein post-1959 events were discussed; to be indemnifiable, we suggest, they must be proceedings in connection with Count II of the original complaint.

15. Phillips repeatedly charges me with ethical dereliction by failing to read the entire post-April 1961 record in Alleghany v. Kirby. Bearing in mind that Phillips contends that Count II "was in vigorous litigation" at least as late as March 30, 1962 (Phillips' Memorandum, p.30), the audaciousness of this attack is nowhere better illustrated than from the following colloquy between Phillips and Judge Dawson at a hearing on December 27, 1961, in Alleghany v. Kirby (pp.43-44):

> "MR. PHILLIPS: That is, if your Honor's calendar is clear, I'm ready to go to trial to try the first count.
>
> THE COURT: How about the second?
>
> MR. PHILLIPS: The second count falls with the first count.
>
> THE COURT: It says you are a bad boy.
>
> MR. PHILLIPS: I'm a bad boy, but I have resigned.
>
> THE COURT: The second count is moot now.
>
> MR. PHILLIPS: I would think so, your Honor."

"SUPPRESSION" OF MINNESOTA LAW

16. In IDS' moving papers, we urged that a permissive indemnification statute was in force in Minnesota from 1951 to 1969, and that IDS did not have by-law provisions for directors' indemnification during this period. Phillips has

responded as follows (Phillips' Rule 11 affirmation ¶35):

> "Thus attorney Bond has pleaded on the basis of the 1951 Minnesota indemnification statute which if using 'the best of his knowledge, information and belief', as required by Rule 11, he must have known was replaced by the 1969 statute which is both retroactive so as to apply to this 'completed action' and which is mandatory. That his ANSWER is based on the suppression of his 'knowledge, information and belief' with respect to the 1969 statute is shown by his above-quoted reference in paragraph 31 to the 1951 statute as 'applicable to this action' which 'by its terms is permissive.'" [Footnote omitted]

17. In fact, as shown in the accompanying reply memorandum, there appears to be no valid basis for asserting that the 1969 Minnesota statute is retroactive, or that the Minnesota statute applicable to Phillips' action is other than the 1951 statute. Phillips' tactic of attempting to buttress an unsupportable legal argument by accusing counsel opposing him of having violated the Canons of Professional Ethics should not be countenanced by the Court.

THE JUDGMENT IN ALLEGHANY v. KIRBY

18. In a seemingly desperate effort to avoid the six year limitations period applicable to his purported claim, Phillips argues that the attorneys' fees he now seeks are "costs" pursuant to the June 5, 1963 judgment for defendants in Alleghany v. Kirby, as to which there is a twenty year limitations period under Section 211(b) of the New York Civil Practice Law and Rules (Opposition Memorandum, pp.50-51).

19. In addition to obvious legal barriers dealt with in IDS' reply memorandum, the record in Alleghany v. Kirby indicates that defendants specifically sought a provision

in the judgment for retention of jurisdiction for later attorneys' fee applications to be assessed against Alleghany (See ¶23 of Phillips' Rule 11 affirmation). This request was opposed by Townley, Updike, Carter & Rogers, attorneys for Alleghany, on the ground -- among others -- that no provision therefor was made in Judge Dawson's opinion (Ex. I hereto). And the judgment approved by Judge Dawson did not include any such provision requested by defendants (Ex. J hereto). It therefore seems clear that Phillips cannot factually bring his attorneys' fee claim under the umbrella of a judgment in Alleghany v. Kirby, when the propriety of its inclusion in that judgment was before Judge Dawson and rejected by him.

ALLEGED CONFLICT OF INTEREST

20. In keeping with the generally scurrilous tone of his papers, Phillips' most recent charge, contained in paragraphs 5-7 of his "supplemental affidavit," untimely served on January 22, 1975, is that Donovan Leisure represented Phillips in his "role of Chairman of the Finance & Law Committee" of IDS' Board; that Donovan Leisure "chose" me to represent IDS herein; that I "formerly was associated with the Donovan firm"; that Phillips therefore is "being opposed herein by my former counsel in these matters through Mr. Bond and without my consent"; and that Phillips intends to seek action by the Court" in accordance with the established standards of professional conduct."

21. Phillips never suggests how Donovan Leisure, which during certain periods represented IDS, possibly could have a duty to Phillips individually which precludes it from supporting IDS in a suit against its client by Phillips. Nor has Phillips suggested why my association some years ago with Donovan Leisure should preclude my firm from representing IDS. Phillips unsuccessfully raised an analogous argument in his bitter attack in this action on Judge Frankel. See opinion and order dated July 3, 1972, and papers submitted in connection with Phillips' motion for reargument of Judge Frankel's order dated June 15, 1972. This latest conflict of interest suggestion is even more far-fetched than that asserted against Judge Frankel, if that be possible, and must be rejected.

CONCLUSION

22. The merits of the positions asserted in IDS' motion to dismiss and for summary judgment should not be lost in the diversionary barrage of baseless accusations which Phillips once again has hurled against all who oppose him. The undeniable fact remains that Phillips never even made demand on IDS until seven years after his purported claim arose. And the undeniable fact remains that Phillips, not a lawyer, seeks the equivalent of legal fees when he incurred none. It is difficult to conceive of a less appealing claim by a less appealing supplicant.

Richard L. Bond

Sworn to before me this
27th day of January, 1975.

[illegible]
Notary Public [illegible]
No. [illegible]
Qualified in [illegible]
Commission Expires [illegible] 1975

223a

Exhibit 8

Law Offices of
Donovan Leisure Newton & Irvine
Two Wall Street
New York 5, N. Y.

WILLIAM J. DONOVAN
1883-1959

GEORGE S. LEISURE
CARL ELDRIDGE NEWTON
RALSTONE R. IRVINE
THOMAS J. McFADDEN
OTTO C. DOERING, JR.
DAVID TEITELBAUM
FRANCIS A. BRICK, JR.
GRANVILLE WHITTLESEY, JR.
CARTER T. O'SHEA
JAMES R. WITHROW, JR.
MALCOLM FOOSHEE
BRICE P. McALLISTER
JAMES V. HAYES
ROY W. McDONALD
THEODORE S. HOPE, JR.
WALTER R. MANSFIELD
GEORGE ARNOLD
RICHARD T. HOLCOMB
GEORGE S. LEISURE, JR.
ALGERNON CARLAHAN
ROBERT M. LOEFFLER
MAHLON F. PERKINS, JR.
JOHN E. TOBIN
ROBERT F. MORTEN

WASHINGTON OFFICE
CAFRITZ BUILDING
1625 EYE STREET, N. W.
WASHINGTON 6, D. C.

CABLE ADDRESS: DONLARD, NEW YORK

October 5, 1960

Mr. Randolph Phillips
250 Park Avenue
New York, New York

Dear Randolph:

As we prepare to answer in the Murchison and the Freeman actions, I deem it advisable to clarify our situation with respect to your position as an individual defendant.

You will be appearing pro se. Mr. Kissam will appear for Alleghany and Mr. Ireland. Our firm will appear for Messrs. Allan P. Kirby and Fred M. Kirby. I equate your pro se appearance to the appearances by counsel.

Accordingly, you, Mr. Kissam, and I should at all times freely exchange advice, information, and views on matters of common interest to the several defendants. This will include, obviously, recommendations as to procedures which you may wish to consider.

When it comes to the final decision as to the form or content of instruments to be filed, or as to any procedure to be followed, each of us will necessarily bear the final responsibility for the decision as to his respective client -- Mr. Kissam for Alleghany and Mr. Ireland; I for the Messrs. Kirby; and you for yourself. I should assume that in all foreseeable cases we shall agree on a common course, but I did want to be clear as to our respective responsibilities where any pleading, document, or action on behalf of one defendant differs from that on behalf of any other.

With kindest regards, I am

Sincerely yours,

Roy W. McDonald

BEST COPY AVAILABLE

Exhibit H.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEWYORK

RANDOLPH PHILLIPS, Plaintiff, -against- INVESTORS DIVERSIFIED SERVICES, INC. and ALLEGHANY CORPORATION, Defendants.	72 Civ. 1544 (CHT) AFFIDAVIT

DISTRICT OF COLUMBIA) ss.:

ROBERT M. LOEFFLER, being duly sworn, deposes and says:

1. I am an attorney and a member of the Bar of this Court. During the period from 1960 through January 1965, as a member of the firm of Donovan Leisure Newton & Irvine, I participated in the defense of Allan P. Kirby and Fred M. Kirby in this Court and appellate courts in Alleghany Corporation v. Kirby, et al. (60 Civ. 3511). Commencing February 1, 1965, I became Vice President-Law of Investors Diversified Services, Inc. ("IDS"), and left IDS in 1973 to accept an appointment by the United States District Court for the Central District of California as Trustee of The Equity Funding Corporation of America, which position I presently hold.

2. I am the author of the June 5, 1963 letter to the Judgment Clerk of this Court which is Exhibit A to Mr. Phillips' affidavit in support of a motion for summary judgment against IDS in the instant action. Mr. Phillips attempts to read my June 5, 1963 letter as an

acknowledgment by Donovan Leisure Newton & Irvine that Phillips was entitled to indemnification from Alleghany Corporation and/or IDS for Phillips' time spent in his pro se defense in Alleghany Corporation v. Kirby, et al. It is clear on the face of my letter that it simply does not say what Mr. Phillips suggests. My sole intention was to protect a potential position on behalf of Messrs. Allan P. Kirby and Fred M. Kirby, in the event they desired at a subsequent time to apply to this Court for indemnification from Alleghany Corporation of the large legal fees and expenses they had incurred. As it turned out, the decision was later made that indemnification was inappropriate, and to the best of my knowledge no such application ever was made by or on behalf of the Messrs. Kirby. A copy of my letter was sent to Mr. Phillips because he was representing himself in that action, just as copies were sent to counsel for other parties to the action.

3. In Mr. Phillips' affidavit he states that there was an oral agreement entered into in October 1964, pursuant to which Phillips withdrew his application in 60 Civ. 3511 for $94,950.00 from Alleghany Corporation as "reasonable expenses" for the time spent by him in defending himself in that case. Although I knew in the summer of 1964 that Mr. Phillips desired such a payment and was aware of the filing and withdrawal of his application, I never heard from any source that any agreement had been made to pay Phillips. The first time

I ever heard of any such purported agreement was in the summer of 1970 when Phillips wrote to Donovan Leisure Newton & Irvine stating that such an oral agreement had been reached in October 1964. Had there been any such agreement made by or known to either of my former partners, Carl E. Newton and Roy W. McDonald, with whom I was working closely in 1964, it is highly likely that I would have been informed of it. Moreover, I was friendly with and frequently saw Charles T. Ireland, Jr. during the fall of 1964, and he never told me that any agreement had been made to pay Phillips.

4. From February 1965 until last year, I was the highest ranking legal officer at IDS. Had there been any agreement by IDS to pay Mr. Phillips, in the normal course of IDS' business it would have been brought to my attention. Apart from Mr. Phillips' own contentions in and after 1970, I never was advised of such an agreement.

Robert M. Loeffler

Sworn to before me this

25th day of October, 1974

Notary Public

[illegible]

Exhibit I (a)

3599-5

COPY

ENTERED DOCKET

TOWNLEY, UPDIKE, CARTER & RODGERS
220 EAST FORTY SECOND STREET
NEW YORK 17, N. Y.

Received by mail 6/6/63 (postmarked 6/5/63)

June 5, 1963

Mr. Michael Genovese
Judgment Clerk
United States District Court
Southern District of New York
Foley Square
New York 7, New York

Dear Mr. Genovese:

Re: Allegheny Corporation v. Kirby, et al.
Civil Action No. 60-3511

We have received this afternoon a copy of a letter dated today to you from Messrs. Donovan Leisure Newton & Irvine requesting the addition of special language to the judgment in the above-entitled action.

The requested language pertains to a provision for the retention of jurisdiction for the purpose of hearing and determining applications for reimbursement of costs and expenses, including attorneys' fees, incurred by defendants.

In making this request, defendants maintain that they have such rights to indemnification regardless of the inclusion of the requested language in the judgment herein. Moreover, we draw to your attention that Local General Rule 10 precludes the inclusion of such language in the judgment because there is no provision therefor in the opinion and decision of the Court dated May 28, 1963.

For both reasons, we object to the inclusion of the requested language. We believe that, following the prompt entry of judgment, strictly in accordance with Local General Rule 10 and the last sentence of Federal Rule 58, defendants may make whatever applications they deem themselves entitled to make under the circumstances.

Very truly yours,

TOWNLEY, UPDIKE, CARTER & RODGERS

By S. Updike

SNU;mg

Copies to:

Honorable Archie O. Dawson
Donovan Leisure Newton & Irvine, Esqs.
Kissam & Halpin, Esqs.
Mr. Randolph Phillips

Exhibit J

ENTERED IN OFFICE DOCKET

U.S. DISTRICT COURT FILED JUN 5 1963 S.D. OF N.Y.

Judgment Entered 5/6 3

#256

#258

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF

- x

ALLEGHANY CORPORATION, on behalf of themselves and all other stockholders similarly situated,

Plaintiffs,

-vs-

60 Civ 3511

ALLAN P. KIRBY, RANDOLPH PHILLIPS, CHARLES T. IRELAND, JR., and FRED M. KIRBY,

Defendants.

- x

The issues in the above entitled proceeding having been brought on regularly for trial before the Honorable Archie O. Dawson, United States District Judge on April 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 1963, and the Court having handed down its opinion in favor of the defendants on May 28, 1963, it is

ADJUDGED: That the defendants have judgment against the plaintiff dismissing the complaint with costs and disbursements.

Dated: New York, N.Y.
June 5, 1963.

James E. Valiche
Clerk

APPROVED: 6/5/63.

U. S. D. J.

J.A.R.

96

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - x

RANDOLPH PHILLIPS, :

Plaintiff, :

-against- : 72 Civ. 1544 (CHT)

INVESTORS DIVERSIFIED SERVICES, INC., : OPPOSITION AFFIDAVIT

Defendant. :

- - - - - - - - - - - - - - - - - - x

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

RICHARD L. BOND, being duly sworn, deposes and says:

1. I am a member of Marshall, Bratter, Greene, Allison & Tucker, attorneys herein for defendant Investors Diversified Services, Inc. ("IDS"), and make this affidavit in opposition to a motion by plaintiff Randolph Phillips ("Phillips") to strike IDS' answer to the amended complaint on the supposed ground that the answer is "sham and false" and was made "in violation of Rule 11" of the Federal Rules of Civil Procedure. I have been counsel for defendants throughout this action and am fully familiar with all proceedings herein.

2. Phillips' motion is baseless and should be denied out of hand. He directly and repeatedly attacks my ethics. He accuses other lawyers, despite their high standing at the bar, of assorted misdeeds. My efforts to respond without undue emotionalism should not be misinterpreted;

Phillips' conduct in this lawsuit repeatedly has been outrageous, and I am incensed by his most recent attack.

BACKGROUND

3. This action was commenced in April 1972 against Alleghany Corporation ("Alleghany") and IDS. The factual basis for Phillips' purported claims arises from prior litigation in the New York State courts and in this Court. Phillips was an activist, qua plaintiff and consultant to plaintiffs' attorneys, in protracted derivative litigation during the 1950s for the benefit of Alleghany. These cases were settled as to certain of the defendants in 1959. In 1960, at a time when there was a battle for control of Alleghany, suit was initiated in this Court which contended, inter alia, that Phillips had entered into a "corrupt bargain" with the settling defendants in the earlier derivative litigation, and that Phillips had received -- among other things -- a position on the Board of Directors of IDS as part of the "corrupt bargain".

4. The primary "corrupt bargain" suit was brought derivatively for Alleghany as Murchison, et al. v. Kirby, et al. (S.D.N.Y., 60 Civ. 3511). Prior to trial, the Murchison forces won a proxy fight for control of Alleghany, and the action thereafter was prosecuted as Alleghany Corporation v. Kirby, et al. The defendants in Alleghany v. Kirby with whom Phillips allegedly entered into the "corrupt bargain" were represented by counsel. Phillips, although not a lawyer, elected to represent himself.

5. On June 5, 1963, judgment was entered, after trial, dismissing Alleghany v. Kirby. Appeals were taken as to

defendants other than Phillips, in which they ultimately prevailed. As to Phillips, that case was concluded on June 5, 1963.

6. In the years 1963 - 1965, Phillips made various applications in this Court and commenced suits in the New York Supreme Court to recover compensation from Alleghany for the time he had spent in his pro se defense of Alleghany v. Kirby. None of those efforts was successful. A more complete description of the cases in which these efforts were made, and their disposition, is set forth in prior papers filed herein.

7. In 1970, Phillips wrote to Donovan Leisure Newton & Irvine, in their capacity as counsel to Alleghany and IDS, and demanded that he be paid for the time spent in his pro se defense of Alleghany v. Kirby. His demand was rejected some months later by letter from John E. Tobin, Esq., a member of the Donovan Firm.

8. Phillips' 1970 letter apparently was the first occasion when he looked to IDS, rather than Alleghany, to pay for his time spent in defense of Alleghany v. Kirby. (See Ex. E to Bond Affidavit, dated December 20, 1974, in support of IDS' motion to dismiss or for summary judgment.) IDS had not been a party to Alleghany v. Kirby, and Phillips' belated demand was predicated upon the contention that he was sued in Alleghany v. Kirby as a result of then being a member of the IDS Board of Directors.

9. Nearly nine years after Alleghany v. Kirby was concluded as to Phillips, he commenced the instant action in April 1972.

10. By opinion and order dated September 25, 1972, Alleghany was dismissed from the instant action for lack of subject matter jurisdiction. On reargument, by opinion and order dated December 11, 1972, the Court adhered to its prior determination.

11. Following various other proceedings in the District Court and Court of Appeals, Phillips moved -- prior to expiration of IDS' time to answer the complaint -- for summary judgment. IDS filed extensive papers in opposition and in support of its motion to dismiss or for summary judgment. Prior to determination of the parties' respective motions, on November 18, 1974, Phillips served an amended complaint and took the position that this mooted the pending motions addressed to the original complaint.

12. By stipulation dated December 6, 1974, the parties agreed, _inter alia_, that IDS would consent to service of Phillips' amended complaint, and that all claims contained in the original complaint which were excluded from the amended complaint were to be dismissed with prejudice.

13. On December 20, 1974, IDS moved to dismiss and/or for summary judgment with respect to Phillips' amended complaint. That motion is returnable on January 28, 1975.

THE INSTANT MOTION

14. IDS served its answer to the amended complaint on December 20, 1974. Copies of the amended complaint and answer thereto respectively are annexed as Exhibits A and B to IDS' pending motion to dismiss and/or for summary judgment.

15. On January 17, 1975, Phillips served papers in opposition to IDS' pending motion. At the same time he also served the instant motion to strike IDS' answer for supposed failure to comply with Rule 11. A combined memorandum on both motions also was served by Phillips. On January 22, 1975, Phillips made untimely service of a "supplemental affidavit" and various corrected pages with respect to his previously served papers.

16. The basic thrust of Phillips' Rule 11 motion is that IDS' answer to the amended complaint is "sham and false" and should be stricken for the following reasons:

(a) The attack on Donovan Leisure Newton & Irvine - In "opposing the claims of plaintiff set forth in the amended complaint," I supposedly am "acting under the control and direction of John E. Tobin, a member of the law firm of Donovan Leisure Newton & Irvine" (Phillips Aff., dated January 17, 1975, ¶*4). The Donovan firm "is General Counsel for IDS and Tobin is the partner in charge" (¶5). When the Donovan firm represented defendants Allan P. Kirby and Fred M. Kirby in Alleghany v. Kirby, it purportedly admitted in documents during 1960, 1962 and 1963 that Phillips was entitled to attorneys' fees for his pro se defense of that action (¶¶6, 12, 19, 21, 23). One of the Donovan Leisure documents "admitting" Phillips' claim was so embarrassing that I "procured" a "patently false affidavit" from a former Donovan Leisure partner, Robert M. Loeffler, for use in opposing the instant action (¶¶24-26). From the foregoing, Phillips concludes that I really signed the IDS answer herein "on behalf of Donovan Leisure Newton & Irvine," rather than my own firm, and that the answer is "sham and false" in denying that

---

*Subsequent paragraph references are to Phillips' affirmation in support of the instant motion.

Phillips is entitled to the relief he seeks (¶28).

(b) The attack upon my good faith in asserting legal and factual positions on behalf of my client - Phillips additionally charges that I intentionally misrepresented applicable Minnesota law and "suppressed" information that a 1951 statute was superceded in 1969 (¶¶29-37); that I failed to investigate adequately whether a "false" affidavit filed in 1964 by Stuart N. Updike, Esq., counsel for Alleghany in Alleghany v. Kirby, was supported by the record in that case (¶¶38-50); and that the foregoing constitutes "negligence . . . incompatible with the duty and obligation of an officer of this Court."

17. Phillips' reckless attack on Donovan Leisure is both morally and legally indefensible. To begin with, neither John E. Tobin of that firm, nor anyone else who is a member of or associated with Donovan Leisure, ever saw the IDS answer to Phillips' amended complaint until after it was served and filed. As the partner responsible for my firm's representation of defendants herein, I have determined what position should be taken on behalf of defendants, and the Donovan Leisure firm has not and has not sought to direct what those positions should be. Moreover, it should be borne in mind that Donovan Leisure represented Messrs. Allan P. Kirby and Fred M. Kirby in Alleghany v. Kirby. Alleghany was the plaintiff in that action, and IDS was not even a party. Therefore, even if there were any substance to the strained interpretations Phillips seeks to draw from papers prepared by Donovan Leisure on behalf of their clients in that litigation, there is no reason in law or logic why Alleghany or IDS, who were not there represented by Donovan Leisure, should be bound by them. My contacts with the

Donovan firm in connection with this action have related to gathering facts relevant to the litigation, the efforts which Phillips has characterized as inadequately "negligent". The "false" affidavit Phillips claims I "procured" from Robert M. Loeffler, formerly a member of the Donovan firm and presently the Court-appointed Trustee of Equity Funding Corporation of America, does no more than state the obvious -- that a letter sent by Loeffler to the Court in 1963 meant what it plainly says and was not intended to encompass the strained interpretation now suggested by Phillips. (See Loeffler Affidavit, dated October 25, 1974, filed in support of IDS' position on cross-motions for summary judgment which were mooted by service of plaintiff's amended complaint.) Some years ago, I was associated with Donovan Leisure Newton & Irvine, and I proudly count many of its partners and alumni among my close friends. The Donovan firm has a deservedly fine reputation; Phillips' gratuitous attacks on Donovan Leisure are baseless and offensive.

18. Phillips' attacks on me are best answered by reference to the papers before the Court on IDS' motion to dismiss and/or for summary judgment, returnable January 28, 1975. Those papers contain the factual and legal grounds for the positions taken in IDS' answer to the amended complaint. I respectfully suggest that the bona fides of IDS' answer will be apparent to the Court on consideration of that motion, and reiteration here of the positions there taken would serve no useful purpose, since the motions undoubtedly will be considered together.

19. Finally, it is urged that the Court should take appropriate steps to contain Phillips' inexcusable conduct. Phillips has launched baseless attacks on numerous distinguished judges and lawyers throughout his pro se conduct of this case, including bitter assaults on the integrity of Judges Frankel and Timbers when they ruled against Phillips in prior proceedings herein. He has sought to impugn my integrity from the outset, without cause or provocation. See opinion herein by Judge Frankel, dated June 15, 1972. This is a familiar Phillips pattern. Under the protective umbrella of a pro se position, Phillips long has engaged in unwarranted character assassination as a litigation technique. In the accompanying memorandum, we quote an opinion by then Circuit Judge Kaufman in which Phillips was expressly reprimanded in 1963 for similar conduct. Indeed, Judge Weinfeld rejected a Rule 11 motion by Phillips in Murchison v. Kirby, 27 F.R.D. 14, 18-19 (S.D.N.Y. 1961), noting with disapproval Phillips' attack upon counsel opposing him.

20. It is respectfully urged that Phillips' motion to strike IDS' answer to the amended complaint is frivolous, and that his improper conduct should be deterred by imposition of costs and attorneys' fees incurred in opposing this motion.

Richard L Bond

Richard L. Bond

Sworn to before me this
24th day of January, 1975.

Beverly Sue Collier

Notary Public

BEVERLY SUE COLLIER
Notary Public, State of New York
[illegible]
[illegible] County
[illegible] 1975
[illegible]

103

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - x

RANDOLPH PHILLIPS,	:	72 Civ. 1544 (CHT)
Plaintiff,	:	
-against-	:	ORDER TO SHOW CAUSE
INVESTORS DIVERSIFIED SERVICES, INC.,	:	
	:	
Defendant.	:	

- - - - - - - - - - - - - - - - - - x

Upon the annexed affidavit of Richard L. Bond, Esq., sworn to on February 4, 1975, and the exhibits annexed thereto, and upon this Court's opinion and order dated August 28, 1974 and filed August 30, 1974, and all prior proceedings herein,

CHT LET plaintiff, Randolph Phillips, show cause before this Court, in Room [illegible] 7, United States Court House, Foley Square,

CHT New York, New York, on the 7th day of February, 1975, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel may be heard,

WHY an order should not be entered:

(1) Pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, vacating the notice of deposition served by plaintiff Randolph Phillips on January 31, 1975, to depose defendant Investors Diversified Services, Inc. ("IDS"), by Fred M. Kirby, Chairman of the Board of Directors, commencing on February 7, 1975, and staying plaintiff from initiating or conducting any pretrial discovery herein, including the

aforesaid noticed deposition, until ten (10) days after service of notice of entry of an order deciding the sub judice motions herein by IDS to dismiss and/or for summary judgment and by plaintiff for summary judgment and to strike IDS' answer to the amended complaint;

(2) Pursuant to the general equity powers of the Court, for the costs and expenses, including reasonable attorneys' fees, incurred by IDS in making this motion; and

(3) Pursuant to the general equity powers of the Court, prohibiting plaintiff from communicating with IDS or with Alleghany Corporation, or with the officers, directors, employees or agents of either of them, concerning the above-entitled action or matters related thereto, except through counsel herein for IDS and Alleghany Corporation.

IT IS FURTHER ORDERED that the aforementioned deposition of defendant IDS is stayed until ten (10) days after service of notice of entry of an order deciding the aforesaid motion to vacate or stay said deposition.

IT IS FURTHER ORDERED that, pending determination of this motion, plaintiff shall be and is prohibited from communicating with IDS or with Alleghany Corporation, or with the officers, directors, employees or agents of either of them, concerning the above-entitled action or any matters related thereto, except through counsel herein for IDS and Alleghany Corporation.

IT IS FURTHER ORDERED that service of a copy of this order and the papers upon which it is based upon plaintiff by either personal service or the leaving of a copy of said papers at the address listed by plaintiff upon the amended complaint, 30 East 72nd Street, New York, New York, on or before 12:00 o'clock ~~P.M.~~ Noon on the 5 day of February, 1975, shall be deemed good and sufficient service.

Dated: New York, New York
February 4, 1975

/s/ Charles H. Tenney
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - x
RANDOLPH PHILLIPS, :

Plaintiff, :

-against- : 72 Civ. 1544 - CHT

INVESTORS DIVERSIFIED SERVICES, INC., : AFFIDAVIT

Defendant. :
- - - - - - - - - - - - - - - - - - x

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

RICHARD L. BOND, being duly sworn deposes and says:

1. I am a member of Marshall, Bratter, Greene, Allison & Tucker, attorneys herein for defendants Investors Diversified Services, Inc. ("IDS") and Alleghany Corporation. This affidavit is in support of a motion to vacate or stay the deposition of IDS by its Chairman, Fred M. Kirby, for attorneys' fees and expenses incurred by IDS in connection with this motion, and in support of an order to bar Phillips from communicating directly with my firm's clients concerning this litigation. A copy of plaintiff's notice to depose IDS by Mr. Kirby is annexed as Exhibit A.

2. The reason why this motion is made by order to show cause is that there otherwise would be insufficient time to bring on the motion prior to the date noticed for commencement of Mr. Kirby's examination. Plaintiff's deposition notice was served at 5:35 P.M. on Friday, January 31, 1975, and it calls for the deposition to commence on Friday, February 7, 1975 at 10:30 A.M. and to "continue from day to day until completed."

3. The grounds for this motion are:

(a) In the present posture of this action, wherein motions by IDS to dismiss and/or for summary judgment and by plaintiff for summary judgment are sub judice, the deposition of IDS at this time is unwarranted and will cause undue oppression, burden and expense.

(b) By opinion and order of this Court, dated August 28 and entered August 30, 1974 (Exhibit B hereto), plaintiff was stayed:

> "...from initiating or conducting any pre-trial discovery, including the deposition of Mr. Kirby which is now pending,...the stay to remain in effect until ten days after the determination of any IDS motion to dismiss...for any reason not based upon matters outside the pleadings..."

(c) Plaintiff Phillips recently commenced an action against Mr. Fred M. Kirby and others, and there is the potentiality for abuse of the deposition of Mr. Kirby which Phillips proposes to take, particularly in view of the manner in which Phillips has conducted himself in his pro se representations in the instant action and in other litigation.

RELEVANT PRIOR PROCEEDINGS

4. This is the second time Phillips has noticed the deposition of IDS by its Chairman, Mr. Fred M. Kirby. Phillips' first such notice was served on June 7, 1974,

for Mr. Kirby's examination on June 17, 1974. IDS was compelled to move to vacate or stay that notice, on grounds substantially similar to those upon which the instant motion is based.

5. In staying the prior notice to depose IDS by Mr. Kirby, the procedural setting was not materially different from that which presently exists. There then was pending a motion by IDS to dismiss, which had been made in 1972 but which remained undecided because of proceedings in the Court of Appeals. Due to changed circumstances subsequent to IDS' 1972 motion to dismiss (the dismissal of co-defendant Alleghany Corporation for lack of subject matter jurisdiction), IDS at that time sought to amend its motion to dismiss and/or to move for summary judgment, and requested that Phillips be stayed from pre-trial proceedings until determination of any such motion. In his decision dated August 28, 1975 (Exhibit B at p. 9), Judge Tenney granted so much of IDS' motion as sought to stay any pre-trial discovery by Phillips, including the examination of Mr. Kirby, until after determination of any motion to dismiss that IDS might make.

6. The August 28, 1974 opinion and order (Exhibit B) also denied a cross-motion by Phillips to vacate certain prior orders herein, and Phillips noticed an appeal from denial of his cross-motion. Additionally, he sought to mandamus the District Court with respect to the same subject matter. Phillips' appeal and mandamus petition were respectively

dismissed and denied by the Court of Appeals on October 7, 1974.

7. On or about October 19, 1974, Phillips moved for summary judgment against IDS. In addition to opposing, IDS sought dismissal and/or summary judgment in its favor.

8. On or about November 18, 1974, while the aforesaid motions by both parties for summary judgment and by IDS to dismiss were pending, Phillips served and filed an amended complaint and took the position that it mooted the pending motions. By stipulation "so ordered" on December 9, 1974, IDS consented to service of the amended complaint, and Phillips agreed that all matters excluded from his original complaint were to be dismissed with prejudice.

9. As a result of the aforesaid stipulation, by orders dated December 9, 1974, IDS' motions for leave to amend its motion to dismiss and for summary judgment were disposed of "as moot".

10. On December 20, 1974, IDS timely moved to dismiss the amended complaint and/or for summary judgment and served its answer to the amended complaint. The return on that motion was adjourned at Phillips' request, and on January 17, 1975, he served papers in opposition to IDS' motion and in support of summary judgment for plaintiff. In addition, Phillips simultaneously served a motion pursuant to Rule 11 of the Federal Rules of Civil Procedure to strike IDS' answer to the amended complaint as "sham and false". Phillips served supplemental papers in support of

his position on January 22, 1975. IDS served answering papers in opposition to the Rule 11 motion on January 24 and reply papers in support of its motion to dismiss and/or for summary judgment (and in opposition to Phillips' request for summary judgment) on January 27, 1975. Those motions remain pending, and I was advised yesterday that Phillips had obtained an ex parte order extending until February 10th his time to file additional papers on the pending motions.

PHILLIPS' STATED REASONS FOR AGAIN NOTICING THE DEPOSITION OF IDS BY ITS CHAIRMAN

11. I telephoned Mr. Phillips on February 3, 1975, and requested that he agree to defer the proposed deposition of IDS until after decision on the pending motions. Phillips refused. In response to my question as to what relevant to the pending motions he sought to inquire into, Phillips responded that he was interested in exploring my "representations contrary to representations made by the Donovan firm" and my "conflict" in representing IDS in light of my formerly having been associated with Donovan Leisure. Phillips added that he might have other matters to inquire into on the examination of Mr. Kirby; that I was the most "disgusting" lawyer he ever had encountered; and that my conduct in this case was "shocking". Phillips then demanded to know when I was associated with Donovan Leisure Newton & Irvine, to which I declined to respond.

THE PENDING MOTIONS AND THE COURT'S PRIOR ORDER

12. The pending motion by IDS includes, with respect to every claim in the amended complaint, grounds for dismissal which are not dependent upon disputed facts and as to which, in substance, legal inadequacy of the purported claims is asserted. Therefore, the Court's order dated August 28, 1974, would appear to prohibit the most recent deposition notice of IDS by Mr. Kirby under the language quoted in ¶3b _supra_.

13. It would appear, therefore, that this action could be dismissed as to IDS for failure to state a claim upon which relief can be granted. Under these circumstances, to now put IDS and Mr. Fred M. Kirby, who is Chairman of both Alleghany and IDS -- each of which is a public company, to the time and expense of a deposition patently makes no sense and constitutes unnecessary and undue burden or expense. It is impossible to conceive of how pretrial can shed light on, for example, such legal questions as the applicable Minnesota indemnification statute, whether _pro se_ time spent by Phillips is compensable under the terms of the New York indemnification statute, whether Phillips has stated common law or Constitutional claims, etc.

ADDITIONAL POTENTIAL ABUSE

14. On or about December 30, 1974, Phillips commenced a new action in this Court against, among others, Mr. Fred M. Kirby, Alleghany Corporation and John E. Tobin, Esq.

(Mr. Tobin is the Donovan Leisure partner who Phillips has vituperatively and repeatedly attacked in papers filed in this action.) Phillips' new action contains a wide-ranging array of purported claims covering a lengthy period of time; a copy of the summons and complaint in Phillips' latest lawsuit is Exhibit C hereto. Since Phillips never has been noted for his restraint, the demand for examination of Mr. Kirby at this time in the instant action suggests the possibility that Phillips desires information for use in his latest lawsuit. Whether or not that be so, absent a legitimate basis for examining Mr. Fred M. Kirby prior to disposition of the pending motions in the instant action, potential abuse can be avoided by the stay of pretrial herein sought.

ATTORNEYS' FEES

15. Attorneys' fees incurred by IDS in making this motion are sought because it seems manifestly unfair to require IDS to pay for, once again, relief which it obtained pursuant to the Court's order dated August 28, 1974. However Phillips may try to read that order, it would appear unarguable that the Court intended that Phillips not initiate pretrial until after disposition of IDS' motion testing the legal sufficiency of plaintiff's pleading. If the Court's order does not get the message across, perhaps imposition of attorneys' fees will.

PHILLIPS' CONTACTING MY FIRM'S CLIENTS

16. I have been advised that Phillips has undertaken a telephone campaign to obtain information about me, apparently including information not even arguably germane to this litigation (e.g., my residence address). Among the persons whom I am advised that Phillips has tried to reach is at least one IDS officer.

17. Phillips repeatedly has taken the position in this litigation that he is an "attorney". He obviously knows that my firm represents IDS and Alleghany Corporation herein. Therefore, Phillips should be held to at least some of the rudimentary ethical standards, including the prohibition against "Communicating with One of Adverse Interest" pursuant to Disciplinary Rule 7-104 of the American Bar Association Code of Professional Responsibility.

18. For all the foregoing reasons, it is respectfully urged that the order herein sought should be granted in all respects.

Richard L. Bond
Richard L. Bond

Sworn to before me this
4th day of February, 1975.
Beverly Sue Collier
Notary Public

BEVERLY SUE COLLIER
Notary Public, State of New York
No. 31-0707390
Qualified in New York County
Commission Expires March 30, 1975

B/hSi, C

UNITED STATES DISTRIC COURT
SOUTHERN DISTRICT OF NEW YORK
--------------------------------x

Randolph Phillips

against

Investors Diversified Services, Inc.

72 Civ 1541

--------------------------------x

February 7, 1975
10: a.m.

Before: HON. CHARLES H. TENNEY, USDJ

Marshall Bratter Greene Allison & Tucker,
Attorneys for the defendant
by: Richard L. Bond.

THE COURT: Call the case.

(case called.)

THE CLERK: The plaintiff is not here.

MR. BOND: Defendant is ready.

THE COURT: It is now 20 past ten and no word or papers have been filed in response.

MR. BOND: I have not been served with anything, yo Honor.

THE COURT: The motion is granted for a default. One-hundred dollars attorneys fees and cost of the motion.

You submit an order.

MR. BOND: I will, your Honor.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Feb 13 75

RANDOLPH PHILLIPS, Plaintiff, -against- INVESTORS DIVERSIFIED SERVICES, INC., Defendant.	72 Civ. 1544 (CHT) OPPOSITION AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

RICHARD L. BOND, being duly sworn, deposes and says:

1. This affidavit is made in opposition to the following motions by plaintiff Randolph Phillips:

(a) To disqualify me and enjoin me from representing defendant Investors Diversified Services, Inc. ("IDS") in this action; and

(b) To vacate the Court's decision on February 7, 1975, granting a motion made by IDS by order to show cause dated February 4, 1975, and to cite me for contempt of Court for "filing herein a false affidavit of service" of the February 4, 1975 order to show cause and for failing to inform the Court on February 7, 1975 that Phillips previously had served a motion to disqualify me.

2. I am a member of Marshall, Bratter, Greene, Allison & Tucker, attorneys herein for IDS, and have been responsible throughout this action for the conduct of the defense by IDS and by Alleghany Corporation (which was dismissed in 1972). I have knowledge of all prior proceedings herein.

THE DISQUALIFICATION MOTION

3. In the late afternoon of February 4, 1975, Phillips served a motion, allegedly pursuant to "Rule 5(b)(4) of the General Rules of this Court,"* to disqualify me. The motion is made returnable February 14, 1975.

4. The thrust of Phillips' disqualification motion is that Donovan Leisure Newton & Irvine allegedly represented Phillips during the period June 1960 through April 1961; that I was associated with Donovan Leisure during that period; that Donovan Leisure supposedly rendered legal advice to Phillips during 1960-1961 with respect to matters as to which Phillips and others were sued in Murchison, et al. v. Kirby, et al. (60 Civ. 3511, S.D.N.Y.); that the "present lawsuit is substantially related to the matters" wherein the Donovan firm purportedly was disqualified from representing IDS herein; and that I, a former Donovan Leisure associate, supposedly was selected by the Donovan firm to indirectly do that which

---

*There apparently is no such Rule. Rule 5 of the General Rules deals with discipline of attorneys; subparagraph (b) thereof has no numbered subdivisions. Moreover, it is questionable whether Phillips has standing to initiate disciplinary proceedings, which are committed under General Rule 5(a) to the Chief Judge. Also see, e.g., Mattice v. Meyer, 353 F.2d 316 (8th Cir. 1965), cert. den., 383 U.S. 939 (1966).

it could not do directly[*] (Phillips Affirmation dated February 4, 1975.)

5. Phillips' motion is nonsense, and I suggest that he knows it is nonsense. To begin with, Donovan Leisure Newton & Irvine did not represent Phillips. A careful reading of Phillips' affirmation shows that Donovan Leisure is alleged to have represented IDS during 1960-1961, not Phillips individually. Phillips tries to leap this hurdle by converting the Donovan firm's corporate representation into a personal representation of Phillips by virtue of Phillips having been an IDS director from April 1960 through April 1961. Lest there by any doubt as to whom the Donovan firm in fact represented, the accompanying affidavit of Carl E. Newton, Esq., a senior partner of Donovan Leisure Newton & Irvine who was active in his firm's representation of IDS at that time, states unequivocally that Donovan Leisure *never* has represented Phillips and *never* has received a legal fee from him.

6. That is not the only flaw in Phillips' outrageous disqualification motion. Phillips argues that the Donovan firm gave him "legal advice and assistance" as to matters for which he was sued in 1960 in *Murchison* v. *Kirby*, and "*the present lawsuit is substantially related to [such] matters*" (emphasis added). The relationship Phillips would find has absolutely no bearing on any issue in the case at

---

[*] Phillips also asserts that the Donovan firm made representations to the Court in 1962 and 1963 in *Murchison* v. *Kirby* to the effect that he was entitled to recover for what, a decade later, became the claim in the instant action. As pointed out in detail in prior papers filed herein, no such representations were made. Indeed, Donovan Leisure did not represent IDS when the alleged representations were made; and IDS was not even a party to *Murchison* v. *Kirby*.

bar. In the instant action, commenced in 1972, Phillips seeks the equivalent of attorneys' fees for his pro se defense in 1960-1963 of Murchison v. Kirby (later Alleghany v. Kirby), even though Phillips is not and was not a lawyer and never has alleged that he paid or became obligated to pay counsel in connection with his defense of that action. IDS, which was not a party to Murchison v. Kirby and on whom Phillips never even made a demand until 1970 for the payment which is the subject of this action, has defended herein on the grounds that Phillips has no claim as a matter of law; that any claim Phillips arguably might have had is barred by limitations; and that to the extent a director's right of indemnification could exist, Phillips was fully paid for his full-time services. None of these issues is or can be dependent upon Donovan Leisure's 1960-1961 representation of IDS. Under applicable law, there either is or is not a right to recovery of the "legal fees" this non-lawyer seeks. As a matter of law, Phillips' commencement of suit nine years after his "claim" arose either is or is not barred by limitations. As a matter of fact ascertainable from the public record in Murchison v. Kirby, there either was or was not prosecuted against Phillips claims arising from his service as an IDS director during the period after Phillips went off the IDS payroll.

Yet Donovan [illegible] [illegible] //

7. Finally, it is noteworthy that Phillips does not suggest that I participated in any way in the Donovan firm's 1960-1961 representation of IDS, let alone anything having any relationship to Phillips. While I no dot see what relevance it would have in any event, for the reasons

set forth in paragraph 5 and 6 above, I am as certain as one can be after the passage of fifteen years that I had no participation of any kind in Donovan Leisure's 1960-1961 IDS representation to which Phillips points.

8. Phillips' efforts to derivatively disqualify me through the Donovan firm must fail. There is no basis for concluding that Donovan Leisure would have a conflict barring its representation of IDS herein; even less, if that be possible, for concluding that I am disqualified.

PLAINTIFF'S MOTION TO VACATE THE COURT'S FEBRUARY 7, 1975 DECISION AND TO CITE ME FOR CONTEMPT

9. In the early afternoon of February 4, 1975, I presented at Judge Tenney's Chambers an order to show cause to vacate Phillips' notice to depose IDS by its Chairman, to stay pre-trial by Phillips pending resolution of previously filed motions, and to prevent continued efforts by Phillips to communicate directly with my firm's clients concerning the subject matter of this action.* In addition, based upon Phillips' refusal to agree to reasonable resolution of the discovery question despite a prior order of the Court barring him from initiating discovery at this time, costs and attorneys' fees incurred in making the motion were sought.

---

* Although Phillips' motions treat me as a single practitioner, it is my firm -- and not me individually -- which represents defendants herein.

10. Although the February 4, 1975 order to show cause did not require service on Phillips until noon on February 5, 1975, immediately upon return to my office on February 4th, I dispatched a law clerk employed by my firm to serve Phillips with the order to show cause and supporting papers. Prior to our law clerk's return to my firm's offices, Phillips appeared at our offices at 5:15 P.M. and served his motion to disqualify me, and another notice to depose IDS (by its Vice President and General Counsel, Joseph F. Grinnell, Esq.). When notified that Phillips was in our offices, I instructed my firm's managing clerk to advise him that we had just served him at his residence with an order to show cause. Our managing clerk told me that she so advised Phillips, and that he responded, "I expected that."

11. Because of Phillips' service of a notice to depose IDS by Mr. Grinnell subsequent to the signing of IDS' order to show cause seeking, inter alia, a stay of "any pretrial discovery herein" by plaintiff, the next morning I prepared a supplemental affidavit which annexed plaintiff's notice to examine Mr. Grinnell, which was served and filed on February 5, 1975.

12. IDS' February 4, 1975 order to show cause was made returnable before Judge Tenney at 10:00 A.M. on February 7, 1975. I appeared timely. Although the Judge waited until approximately 10:20 A.M., Phillips did not appear. After ascertaining whether any opposition papers had been served or filed or whether Phillips otherwise had indicated he would not appear, Judge Tenney granted the motion on default, imposing $100 costs and attorneys' fees. As directed by the

Court, I served and filed a proposed order on the afternoon of the same day. A copy of the transcript of the February 7, 1975 hearing is Exhibit A hereto.

13. Phillips now claims that his cavalier default was justified because he "received no copy [of the order to show cause and supporting papers] either by personal service or by delivery as aforesaid at any time prior to February 5, 1975 or thereafter" (Phillips Affirmation dated February 7, 1975, ¶1).

14. Phillips' supposed grievance is not that he failed to receive the order to show cause and papers on which it was based. Rather, his contention is that the copy of my supporting affidavit which was served upon him did not contain written signatures by me or the notary who witnessed my oath, but contained only my typed signature and a typed signature block for the notary (Id. at ¶3).

15. Phillips seeks to use this hyper-technical position to justify his failure to appear in response to an order of the Court of which he undeniably was aware some three days before the return of IDS' motion. Phillips of course could have, if it really mattered to him, called my office and brought this supposed "defect" to our attention, but he did not. Phillips could have examined the original of my affidavit, complete with signatures by me and the notary, at the Court House -- as he concededly did later on the same day that IDS' motion was returnable (Id. at ¶4). But he did none of these reasonable things. Instead, Phillips chose to ignore an order by the Court to appear, gave no notice to the Court or counsel that he intended not to appear,

and apparently decided to brazen it out on a meaningless technicality. (See accompanying memorandum of law.) I submit that no responsible person would act so outrageously.

16. It is noteworthy that Phillips does not impose the same standards on himself as he would impose on me. On the very order to show cause that Phillips obtained on February 7, 1975, to vacate the decision made earlier that day because he supposedly was not served with a "copy" of IDS' papers, Phillips served my office with an incomplete copy of his own papers, which failed to annex either of the exhibits referred to in Phillips'Affirmation in support of his motion. (See references to Exhibit A in ¶3 and Exhibit B in ¶8 of Phillips Affirmation.)

17. Phillips also argues that it was my "obligation" to advise the Court at the return of IDS' motion on February 7, 1975, that Phillips had moved to disqualify me; that I failed to do so; and that this constituted "withholding of a material fact" warranting "holding Bond in contempt" (Phillips Affirmation, ¶7). The short answer is that I did so advise the Court.* My supplemental affidavit of February 5, 1975, which was filed on that date and before the Court on the return of IDS' motion on February 7th, states:

---

*One is tempted to use Phillipsean parlance and characterize his inaccurate affidavit statement as perjurious. The temptation has been rejected. The discipline one expects from the bar -- reluctance to call an error a crime, absent reason to believe it was intentional -- well illustrates why non-lawyer Phillips should not be unnecessarily encouraged in his career as "attorney pro se".

> "5. From the nature of the documents demanded in Phillips' notice to examine IDS by Mr. Grinnell, it would appear that the purpose of this proposed examination is for aid in a motion to disqualify me from representing IDS herein, which Phillips also served late in the day yesterday. That motion is made returnable on February 14, 1975, and will be timely opposed in due course."

18. Quite apart from the fact that Phillips is wrong, Phillips has incredible nerve in suggesting that it was my obligation to tell the Court about his motion to disqualify. As the movant, Phillips was obligated to seasonably file his motion, as required by Rule 6(d) of the Federal Rules of Civil Procedure. Furthermore, if he felt that the disqualification motion was so important to the IDS motion heard on February 7th, Phillips could have appeared and advised the Court or sought a stay of other proceedings until the disqualification motion was decided. Finally, I am at a loss to understand what obligation was imposed upon me to advise Judge Tenney that another Phillips' motion, which I view as baseless, had been made.

PHILLIPS' TACTICS MUST BE STOPPED

19. In some seventeen years of practicing law, I have never been subjected to anything resembling the torrent of abuse relentlessly and repetitively unleashed by Phillips in this lawsuit. Virtually all my professional life has been spent in litigation, where passions often run high, but I cannot be insensitive to Phillips' constant attacks on my integrity.

20. Because I value my professional reputation and firmly believe that I have obligations to this Court and all courts before which I appear*, it is essential to make clear that, if there were any substance to Phillips' charges, I would have voluntarily withdrawn long ago. However, I have an equal obligation not to react to Phillips' baseless, senseless and outrageous accusations by withdrawing from a proper representation undertaken in good faith.

21. In the course of this lawsuit, Phillips has bitterly attacked a substantial segment of our respected bench and bar. Under cover of whatever privilege court papers provide, coupled with the well-known reluctance of courts to deal harshly with _pro se_ litigants, Phillips has asserted unethical conduct or worse by District Judge Frankel; Circuit Judges Friendly and Timbers; State Court Referees Robert T. Fitzsimmons and Emanuel Greene; Samuel E. Gates, Esq., a senior partner of Debevoise Plimpton Lyons & Gates; Louis Loeb, Esq., a senior partner of Lord Day & Lord; John E. Tobin, Esq., a senior partner of Donovan Leisure Newton & Irvine; Abraham L. Pomerantz, Esq., a senior partner of Pomerantz Levy Houdek & Block; Robert M. Loeffler, Esq., formerly a Senior Vice President of IDS and currently the Trustee of Equity Funding Corporation pursuant to appointment by the United States District Court for the Central District of California; and others. Some flavor of these accusations, all of record herein, may be gleaned from Phillips' statement that Judges Friendly, Timbers and Frankel "dishonor the

---

*I am a member of the bar of the New York courts; the United States District Courts for the Southern and Eastern Districts of New York; the United States Courts of Appeal for the Second, Third and Seventh Circuits; and the Supreme Court of the United States. Additionally, I have appeared _pro hac vice_ in numerous other federal courts and agencies throughout the country. I have never been the subject of any disciplinary action or proceeding at any time.

reputation of the Circuit" by their "rulings arising out of extra-judicial motivations."

22. These are customary tactics for Phillips, to which he frequently has resorted, unfortunately without effective response from our courts. For example, in seeking to intervene in a mandamus application in the Second Circuit on May 31, 1963, Phillips charged a "collusive understanding" and "inequitable or fraudulent" conduct by Messrs. Gates of the Debevoise firm*, Pomerantz of the Pomerantz firm, and Taggart Whipple of Davis Polk Wardwell Sunderland & Kiendl. See Ackert v. Bryan (No. 27240, 2d Cir., 1963).

23. Phillips' reckless attacks on Messrs. Gates, Pomerantz and Whipple led to an express reprimand by Judge Kaufman on behalf of an unanimous Court of Appeals. See opinion annexed as Exhibit B hereto. The reprimand plainly did not serve its intended purpose. Phillips blithely continues the same reprehensible conduct. It is high time that his character vilification was stopped. Accordingly, I urge that the Court impose costs, including reasonable attorneys' fees, incurred by IDS in opposing this motion, pursuant to the general equity power of the Court, and -- since Phillips has sought improperly to have me cited for contempt -- pursuant to Rule 14(d) of this Court's Civil Rules.

---

*Germane to the case at bar is a recitation in Mr. Gates' opposition affidavit, dated June 11, 1963, that Debevoise Plimpton Lyons & Gates was substituted as counsel for IDS in Ackert v. Ausman on August 1, 1961. This affidavit confirms Phillips' knowledge that the Donovan firm was not representing IDS during 1962 and June 1963, when purported representations were made by Donovan Leisure in Murchison v. Kirby with which Phillips now seeks to bind IDS and its counsel herein.

24. Phillips' motions to disqualify me herein, to vacate the Court's February 7, 1975 decision, and to cite me for contempt are frivolous and should be denied, with costs and reasonable attorneys' fees imposed against Phillips.

Richard L. Bond

Sworn to before me this
13th day of February, 1975.

Notary Public

[illegible] COLLIER
Notary [illegible] New York
No. [illegible]
Qualified in [illegible] County
Commission Expires March 30, 197[illegible]

Exhibit A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-------------------------------x

Randolph Phillips

against

72 Civ 1541

Investors Diversified Services, Inc.

-------------------------------x

February 7, 1975
10: a.m.

Before: HON. CHARLES H. TENNEY, USDJ

Marshall Bratter Greene Allison & Tucker,
Attorneys for the defendant
by: Richard L. Bond.

THE COURT: Call the case.

(case called.)

THE CLERK: The plaintiff is not here.

MR. BOND: Defendant is ready.

THE COURT: It is now 20 past ten and no word or papers have been filed in response.

MR. BOND: I have not been served with anything, your Honor.

THE COURT: The motion is granted for a default. One-hundred dollars attorneys fees and cost of the motion.

You submit an order.

MR. BOND: I will, your Honor.

* * *

Exhibit B

Per Curiam Opinion dated June 21, 1963
by United States Court of Appeals for
the Second Circuit in Ackert v. Ausman

The motion of Randolph Phillips, pro se, for vacatur of order denying petition for mandamus, and for other relief, is denied. We agree in substance with the comments of our brother Kaufman hereto attached.

June 21, 1963
CFC
HJF
IRK U.S.C.JJ.

Kaufman, J., concurring. I too believe that the instant motion should be denied, but I would not want silence on my part to be construed as condonation. The movant, Randolph Phillips, seeks to intervene in a litigation terminated a year and a half ago and also to undo this Court's mandate in that closed litigation on the theory that our judgment was tainted by the fraud of the parties before the Court. He hurls thoroughly unsubstantiated charges at reputable counsel, contending that they fraudulently and corruptly entered into a settlement agreement in a companion case in the New York courts which, had this been known to our Court, would have necessitated our reaching a different conclusion from that recorded at 299 F. 2d 65, rehearing denied, 299 F. 2d 72 (1962). I am not so much concerned with Mr. Phillips' indignation at what he believes to be improper behavior on the part of counsel. What does concern me is his cavalier and outrageous use of the federal courts -- and indeed other forums -- for his unrestrained attacks upon the personal veracity and professional competence of counsel. He has entered, quite belatedly, a litigation which was bitterly contested in the first instance and which received the thorough and painstaking consideration of a panel of this Court, on original hearing and rehearing as well. He comes before this Court wearing the cloak of a pro se applicant, and seeks to extract from us the solicitude ordinarily afforded one appearing without counsel. But this should not shield him from rebuke when merited. He is an intelligent, able and sophisticated litigant, who is no stranger to this Court, having appeared frequently in his own behalf both in the District Court and the Court of Appeals. We would expect that one possessed of his background would be conscious of the outer limits of forceful advocacy and fully aware when his acts transgress those limits. Moreover, we are not to be manipulated by resourceful but meritless moves in a long-closed litigation, moves which serve only to distract us from important judicial business. This is particularly true

EXHIBIT

BEST COPY AVAILABLE

Exhibit C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RANDOLPH PHILLIPS,

Plaintiff,

-against-

INVESTORS DIVERSIFIED SERVICES, INC.,

Defendant.

72 Civ. 1544 (CHT)

AFFIDAVIT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

CARL E. NEWTON, being duly sworn, deposes and says:

1. I am a member of Donovan Leisure Newton & Irvine, a law firm with principal offices at 30 Rockefeller Plaza, New York, New York, and have personal knowledge of the matters hereinafter set forth.

2. My firm served as special counsel to Investors Diversified Services, Inc. ("IDS") from in or about January 1960 to May 22, 1961. Because of a change of control of Alleghany Corporation, which in turn controlled IDS, my firm did not represent IDS from June 1961 until December 10, 1963.

3. From December 10, 1963 to the present, my firm has been and continues to be general counsel for IDS, although other attorneys and law firms from time to time have represented IDS on various matters.

4. My firm never has represented Mr. Randolph Phillips and never has received a fee from him.

Carl E. Newton

Sworn to before me
this 11th day of February,
1975.

Notary Public

LUISA A. FERRARESE
Notary Public, State of New York
No. 41-[illegible] Qual. in Queens Co.
Certificate filed in New York County
Commission Expires March 30, 19[illegible]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

--x

RANDOLPH PHILLIPS, :

Plaintiff,

vs. : 72 Civ. 1544

INVESTORS DIVERSIFIED SERVICES, INC.

Defendant. :

--x

February 14, 1975

BEFORE:

HON. CHARLES H. TENNEY,

District Judge.

APPEARANCES:

RANDOLPH PHILLIPS,
Pro Se

MARSHALL, BRATTER, GREENE, ALLISON
& TUCKER, ESQS.,
Attorneys for Defendant
RICHARD L. BOND, ESQ., of Counsel

(Case called - both sides ready)

THE COURT: Very weol. I'll give you ten or fifteen minutes at the most, Mr. Phillips, because I have a lot of papers here.

MR. PHILLIPS: Yes, sir. I don't know if your Honor has had a chance to read my papers and you know I apologize to the Court for not being present on the return of the order to show cause obtained by Investors Diversified Services. I had a cataract on my right eye and one decending on my left and I therefore have applied for a rehearing of the matters brought on by the order to show cause.

I assume I cannot speak on the subject unless your Honor does grant me the right to be heard at this time.

THE COURT: Well, I have your papers and I'll hear you but I will limit myself to what was within your papers.

MR. PHILLIPS: All right, sir. Let me say that this is the first time, I believe, in the history of this Court that a party has been enjoined from communicating with his own attorney. Your Honor was misled into doing that when you signed the order to show cause with the injunction prohibiting me from in any way communicating with a director, officer or agent of Defendant Investors --

THE COURT: You say communicating with your attorney?

MR. PHILLIPS: Yes, sir.

THE COURT: You are represented by an attorney?

MR. PHILLIPS: No, sir.

THE COURT: Why is your attorney not appearing for you?

MR. PHILLIPS: No, sir, you misunderstood me. I am referring to my attorney in 1960-'61, who was my attorney in the very matter out of which the present case arises.

THE COURT: What did you pay your attorney?

MR. PHILLIPS: There was no retainer paid but as your Honor will see if you allow me to tender up a reply memorandum, it is not required to establish an attorney-client relationship that a retainer be paid.

There are several cases on that issue.

May I hand up a reply memorandum, your Honor?

THE COURT: No.

MR. PHILLIPS: No?

THE COURT: No. You have had almost enough papers in this matter.

MR. PHILLIPS: Your Honor, I only yesterday got their memorandum. I did not have a chance to reply to that memorandum. It is an issue of law and I am putting before your Honor --

THE COURT: We are getting into all of these various areas at a time when there is pending before me and will be soon decided a motion to dismiss your complaint in this case.

MR. PHILLIPS: Well, then, your Honor, may I turn to the motion to disqualify counsel which I believe takes precedence over any motion to dismiss and which I have made on the ground -- pardon?

THE COURT: You mean you are going to put a road-block in the very relief that you are asking for, your lawsuit, right?

MR. PHILLIPS: Your Honor, I guess every party that moves to disqualify adversary counsel does that but there seems to be certain preliminary requirements of ethics which prevent a former attorney from opposing his former client.

THE COURT: On the basis of the papers before me, I don't believe that there is sufficient grounds or any grounds for your motion and I believe at one time my clerk at my instructions told you to proceed with caution in this case. You have already been charged with attorneys' fees and costs. I don't know how long this can go on but, proceed.

MR. PHILLIPS: Well, your Honor, I have been prevented from any discovery whatsoever and my hands have been tied behind my back by my adversary and by your Honor's stay while he punches me with evidence in his control. I have a motion to disqualify. You say I haven't produced evidence to substantiate my right to get the relief there.

How can I without discovery? In the Emle ~~Emily~~ case, the leading case on disqualification in the Second Circuit, there was no question about the party's right to discovery.

I will be glad to make a very short discovery and put to the record the documents that establish that the Donovan, Leisure, Newton & Irvine firm were special counsel to me as chairman of the IDS Financial Committee, but if I am precluded from discovery and only my counsel has the right to put in evidence --

THE COURT: Is that the paper you want?

MR. PHILLIPS: Pardon?

THE COURT: Is that the paper you want? You say that there is a document.

MR. PHILLIPS: Yes, there are documents. I know there are documents that establish the attorney-client relationship. And I want to get those documents by depositi

THE COURT: What relationship does that matter have with this present case that you have?

MR. PHILLIPS: Because a motion to disqualify adversary counsel always is relevant in a case.

THE COURT: If it deals with the same matter on which he acted as counsel and he acted as counsel.

MR. PHILLIPS: That's exactly what I will establish, sir. It deals with exactly the same matter.

May I explain?

I was chairman of the IDS Finance and Law Committee. The firm of Donovan, Leisure, Newton & Irvine were appointed as special counsel to that committee. On the very acts performed by that committee, I was sued.

THE COURT: Yes.

MR. PHILLIPS: And I was co-defendant with Messrs. Kirby of IDS and Donovan, Leisure acted for them and I acted for myself. We interchanged confidential communications as co-defendants. On the very act on which I was sued I was successful and the claim for indemnificatio arises out of that and the Donovan, Leisure firm represented to this Court that I was entitled to indemnification.

Now, it was doubley my counsel. It was my counsel as chairman of the IDS Finance and Law Committee and my counsel in making that representation to this Court and I don't know how else to establish it except through the documents or the oral testimony unless your Honor will accept my own sworn affidavit to that effect but of course if I can't have discovery, I can't make my case and I think your Honor is fair enough to recognize I should have the right to make my case and that's all I am asking but my hands have been tied.

I have had no discovery whatsoever.

THE COURT: All right. I'll hear from Mr. Bond.

MR. PHILLIPS: I was going to say some more on the subject.

THE COURT: Well, you have made your accusations.

MR. PHILLIPS: It is not an accusation, sir. It's a legal position. I don't like to be put in the wrong by vocabulary. I am trying to make a legal position in terms of the Court of Appeals. The Court of Appeals language is the language that I used: Motion to disqualify, right to depose, based on the relationship, prior attorney-client relationship.

I would like to develop the argument but --

THE COURT: All right. Develop it.

MR. PHILLIPS: Well, your Honor, I have affirme

BEST COPY AVAILABLE

subject to the penalties of perjury, that the Donovan, ② Leisure law firm and especially Messrs. Carl E. Newton, John E. Tobin and Walter L. Stratton were counsel to me as chairman of the IDS Finance and Law Committee.

I have not been able to tender any documents to establish that yet because I have not, as I say, had the opportunity to get production or discovery.

In response there is just the naked affidavit of Mr. Newton, who is an old friend of mind of some thirty-odd years standing and I regret to have this dispute with him but there is an affidavit tendered yesterday saying that his firm never represented Mr. Randolph Phillips nor received any fee from him.

Now, as I read that, that is simply a denial that he ever represented me in a personal capacity in non-corporate affairs and that does not meet the issue.

The issue is whether he was special counsel, his firm and the members I have indicated, to me as chairman of the IDS Finance and Law Committee and I intend and will establish that if given the opportunity.

③ If I establish that, I have established the basis for the disqualification under the ~~Emily~~ Emile decision in the Second Circuit. If I cannot establish it, your Honor has every right to deny my motion but this is aprimary right that I have. It takes precedence over anything else before your Honor and, if your Honor will allow me, I will prepare an application for a stay of all other matters in accordance with the precedents set in the Court of Appeals, pending the determination of this motion which is both to disqualify and injunctive and that's all I ask, your Honor, is a chance to be heard in the ordina way by making my case through discovery.

Thank you, sir.

THE COURT: Mr. Bond?

MR. BOND: Your Honor, if I may, at the outset I would like to meet the discovery questions that Mr. Phillips has raised. There are no issues in this case that relate to the matters that Mr. Phillips has suggested. It is conceded and it has been conceded on the record for a long time that Donovan, Leisure, Newton & Irvine served as special counsel to Investors Diversified Services during the period June 1960 to April 1961. The facts are not in dispute on that issue.

It is not in dispute that Mr. Phillips was a director of IDS for one year during that period and that he served as chairman of the IDS Finance and Law Committee, of the board of directors. All that I respectfully suggest has nothing to do with any issue in this case.

What happened there fourteen years ago has no bearing on whether Mr. Phillips has a legal right to be indemnified for the equivalent of attorneys fees when he represented himself pro se in 1961 through 1963 in Allegheny v. Kirby in this court.

If I may, your Honor, I would like to comment very briefly on what we have had happen here, in terms of the proceeding of the last week or ten days.

I think if you look objectively at Mr. Phillips' position, what he now suggests as the reason why he did not appear before your Honor at 10:00 a.m. one week ago is inherently incredible and his conduct thereafter is inexcusable.

We began here with a deposition notice which was, I suggest, served in violation of an order of the Court. Back when your Honor first got involved with this case in the summer of 1974, you held that Mr. Phillips could not examine the chairman of the board of IDS at that time until we got some preliminary matters out of the way, such as whether Mr. Phillips could maintain a claim.

After a lot of backing and filling on things which Mr. Phillips created procedurally, we are back in exactly that position.

As your Honor pointed out earlier, there is a motion to dismiss the amended complaint which is presently before you.

Now, when I was compelled to get that order to show cause last Friday in order to keep Mr. Phillips from again examining the chairman of the board of IDS, we were --

THE COURT: And I might add that Mr. Phillips submitted a paper to me making certain requests about filing papers, extension for filing papers, and the third item on that was to depose Mr. Kirby and that was eliminated. That was eliminated by me and the nextthing I heard was that, over my advice that he proceed cautiously, we have an attempt to depose Mr. Kirby. That is the type of action that I have been faced with in this matter in my brøef association with this case.

MR. BOND: It has gone downhill thereafter, your Honor.

THE COURT: Subsequently thereto I understand that there has been some attempt to depose somebody else.

MR. BOND: Well, I will rapidly get to that, if I may.

I came down here on February 4th and I got an order to show cause signed which stayed that examination. It did one other thing of consequence. It keps Mr. Phillips from communicating directly with my clients in the case.

Mr. Phillips has served me with papers and I no longer know what is or is not in the record but I have been served with papers which suggest that I am afraid to tell the Court what it is I was talking about there.

What I said in my affidavit in support of the order to show cause is precisely accurate. Mr. Phillips knows the facts because he was the participant. He started the events in motion.

Mr. Phillips sought to reach Joseph Grinnell, who is the general counsel and a vice-president of Investors Diversified Services. I happened to be on the phone with Mr. Grinnell because Mr. Phillips served another notice to examine, to examine Mr. Grinnell, who is in Minneapolis.

Mr. Phillips served that one at the same time he served his notice to disqualify me. When he served that I called Mr. Grinnell and advised him of the deposition notice on the following day. I also put in a supplemental affidavit to advise the Court, since we had a hearing on these matters scheduled for that Friday.

At that time, Mr. Grinnell said to me on the telephone, "I have had a prior message that Mr. Phillips tried to reach me and my secretary advises me that he is now on the phone again;shall I take the call".

I said, "Joe, please do not."

I do not want Mr. Phillips seeking to contact my clients directly. In addition to that, the other thing I said in my other papers was that Mr. Phillips has been calling around town for the purpose of trying to get information about me for whatever motives that seem to have no possible bearing on the issues in this case.

One of my friends who is a partner in a firm here in New York who used to be with me at Donovan, Leisure many years ago told me that Mr. Phillips had called him up and wanted to know where I lived, what my residence address was. Mr. Phillips seems perturbed because he can't find that out, because I have an unlisted private telephone number in the phone book. I don't know why he needs to know that. I maintain an office that is open for business in all normal hours.

In any event, when we got around to Friday at 10:00 a.m. and your Honor waited until 20 after 10:00 on this order to show cause, let us assume for the moment that Mr. Phillips indeed had the problem he said he had, that he misread our papers, that he misread 10:00 a.m. for 12:00 noon -- that is what he says. That seems improbable on its face but let's assume that that is so. JS

There is a very reasonable course of action that he might then have taken:

He could have sought a further hearing, a rehearing on the question of the propriety of the order to show cause based upon the fact that he misread the return date on the papers.

But he didn't do that. What he did is he prepared another order to show cause which is filed. Your Honor signed it on Monday, the 10th. The affidavit in support of that order to show cause doesn't say one word, not one word, ABOUT but Mr. Phillips having misread the hour of the return on our motion on Friday morning. It says two things, basically, your Honor:

One, it says that there was no proper service of our papers on Mr. Phillips, and when you read carefully, what he is saying is he was served with a copy of my affidavit which did not bear my written signature. That is his first technical reason for not appearing at all on that morning.

The second reason that he suggests is that I had an obligation to tell you, your Honor, that you couldn't proceed on that motion because Phillips had served me a couple of days earlier with a motion to disqualify me.

Now, that is errant nonsense, I submit. First of all, I did tell you. I put in a supplemental affidavit the following day and it wasn't my motion. If it was so terribly important Mr. Phillips could have come down here and appeared on the motion and said what he had to say. But not a word about the cataract problem.

I am terribly sympathetic if he has a physical problem but I am not sympathetic with this kind of litigation which is costing my clients thousands of unnecessary dollars and I am not sympathetic with being called every conceivable name that one can think of in terms of my professional ethics in a case where I believe that I have conducted myself properly throughout.

Faced with our papers in response yesterday which we served by 12:00 noon as we were supposed to in opposition to Mr. Phillips' order to show cause obtained last Monday, when he read those papers the two basic points that he was making were obviously dead wrong.

One, he said I didn't tell you about the disqualification motion. I pointed to the fact that there was an affidavit filed, filed two days before the return on ILS' motion last Friday, which said exactly what Mr. Philips said I didn't tell you, leaving aside who should have told you in the first place.

The second thing was that Mr. Philips suddenly

jbjw

encountered case law -- dead square case law -- in this district which says if you serve somebody with a copy of the papers it doesn't have to have a signed copy of the affidavit; if the original is signed and filed in the courthouse, it is good enough if you serve him with a complete copy of the papers.

Ironically
Reasonably, when Mr. Phillips took the hypertechnical position that he could ignore the order to show cause which asked him to be down here last Friday morning at 10:00 o'clock, when he took that position after the fact and served me with an order to show cause to vacate whatever your Honor did last Friday, he served me with a set of papers that have an affidavit in support and supposed contains two exhibits and I never got the exhibits.

Now I am not in here on technical grounds. I would like to stay with the substance.

We have been had. We have spent nights and weekends. We have spent lots of money, put in lots of time -- that's the business I am in and I am not complaining about that -- but I have a client that pays for that and it shouldn't have to pay for unnecessary litigation.

I don't think it is so simple a matter any more after we all get dragged through this kind of unnecessary litigation for Mr. Phillips to simply walk in and say, "I'm sorry." He had reasonable courses after he had knowledge of what the situation was that could have prevented much of this and he didn't do it.

In addition to that, I respectfully suggest that it is difficult tobelieve the reason he now suggests.

Your Honor, my papers essentially ask that the Court do a variety of things and I respectfully suggest that those are the things that should be done right now.

We have the following matters which are now before you: You have a motion that you decided on default last Friday. Mr. Phillips has a motion before you now to vacate it.

THE COURT: That motion is denied.

MR. BOND: Thank you, sir.

We have a motion to disqualify me. I will make an offer now to answer any question the Court may have that you think is relevant on disqualification because I can tell you what the facts were. They are in our papers.

There is nothing else. There is nothing else that could conceivably be relevant on the subject. Mr. Phillips has obviously used that as a ~~reply~~ ploy, I suggest, and I think that motion should be denied.

We have a contempt motion. He has sought to hold me in contempt on the most flimsy, frivilous non-existent grounds that one could imagine.

I am frankly tired of being called all these names and having my professional ethics attacked repeatedly in this court. You have the power, your Honor, and you have the right both under your general equity powers and under the rules of the Court to grand expenses and attorneys' fees when a contempt motion has been made and it is denied and if ever there was a case where it should not have been made, this is it and I would respectfully request that in the denial of the motion there should be an award for IDS for attorneys' fees and costs, for two resaons, really:

One is to help pay for some of the unnecessary practice that we have had here but also as a deterrent, very frankly. This is an old tactic of Mr. Phillips. He has been calling lawyers who otherwise are viewed as respectable members of this Bar terrible names for many years. He has been warned over and over by judges in this court and the Court of Appeals and he continues the same conduct and, finally, your Honor, I would hope that I could induce you to enter a specific finding here that the attack on my ethics is baseless.

One of the cases that Mr. Phillips cited in support of his motion to hold me in contempt says right on its face that a lawyer has a right to be exonerated on the record when he is improperly attacked and I would suggest here there has been no basis for that attack and I respectfully request that there be such a finding.

Unless your Honor has any further questions, particularly with respect to the disqualification matter, everything else I have to say is essentially in our papers.

MR. PHILLIPS: Your Honor, may I be heard briefly in response?

THE COURT: Very briefly. Very briefly.

MR. PHILLIPS: In the first place, there is no admission in the record that the firm of Donovan, Leisure, Newton & Irvine acted as special counsel to me as chairman of the IDS Finance and Law Committee. The IDS is now an $8 billion corporation. I brought the control of IDS back to Alleghany. I know the details of its administration eminently. IDS is represented by Donovan Leisure, Newton & Irvine in many, many respects but that admission, so-called, is not an admission of the fact that is material here.

I will establish, if given the chance, that Donovan, Leisure, Newton & Irvine were special counsel to me as chairman of IDS, of the Finance and Law Committee

jbjw

and as a director thereafter.

That is the basis of the suit here.

THE COURT: I believe that that was --

MR. PHILLIPS: No. All he admitted was that IDS, that Donovan, Leisure -- excuse me, your Honor -- that Donovan, Leisure, Newton & Irvine were counsel for IDS. That is not sufficient.

They were counsel to me as chairman.

MR. BOND: I'll solve the problem: If it is helpful, I will stipulate on the record as to exactly what they were. I know what they were.

MR. PHILLIPS: You don't.

It's all hearsay to him. He was not there. He was not one of the members.

THE COURT: If he was not there --

MR.PHILLIPS: He cannot stipulate. Mr. Newton can.

THE COURT: But now you are going to pull your own case apart. If he wasn't there? I thought one of your problems was that he was there and he was participating.

MR. PHILLIPS: No, sir. He was an associate of Donovan, Leisure, Newton & Irvine.

THE COURT: But he didn't know in what way you were represented or anything else?

jbjw

MR. PHILLIPS: He was not part of the team that went out to Minneapolis with me.

THE COURT: All right. That's on the record.

MR. PHILLIPS: And the point of the matter is that an associate, even though not directly -- as a matter of fact, this very issue is sub judice in the Court of Appeals right now, as to whether an associate as distinct from a member can participate as counsel against his firm's former client, that is sub judice. That's been argued before the full panel and I think went en banc as to whether it was appealable and it was decided it was appealable.

THE COURT: What case was that?

MR. PHILLIPS: If you give me a minute, I'll think of it.

It's the Silver case, sir. Silver versus Chrysler Corporation in which the young lawyer --

THE COURT: Yes. I am aware of it.

MR. PHILLIPS: Dale Schreiber, Judge Frankel's former law clerk, is the target of the adversary motion.

THE COURT: Yes.

MR. PHILLIPS: The associate cannot do what the partner cannot do. That's the point. I tried to get that inot my papers and I just have a two-page memorandum. This is not an important issue. I may be an awful son of a bitch, a bastard who calls judges names, that is not the issue. I'll defend the veracity of anything that I say at the time, in a proper way. I was chairman of the National Committee for the Impeachment of Richard Nixon and I was called a traitor by Gerald Ford.

I worked with members of the judiciary committee on that point. I have a right to call a judge a, what shall I say, your Honor, with all due respect. I have a right to call a judge a non-functioning judge if he is. Freedom of speech does not end when you get on the bench.

THE COURT: All right.

MR. PHILLIPS: Let these charges be hurled at me in an evidentiary way, wherel can reply to them, not this --

THE COURT: You are the one who is hurling the charges.

MR. PHILLIPS: No, no. The charges began with this firm. This firm said I deliberately evaded service -- when I was in working with the House Judiciary Committee I deliberately evaded service. The reason I wanted Mr. Bond's telephone number, I couldn't find it in the phone book, he was not listed as an attorney.

He now is.

Now, these charges originated with him and I have responded in kind. Let's hold the balance equal here, sir. Let's have an evidentiary hearing as to whether Randolph Phillips speaks the truth or not. Let me put my witnesses on the stand before you sock me, as he would like you to sock me, with thousands of dollars.

THE COURT: I am not going to sock you with thousands of dollars. I am going to look over the complaint that we have here and see whether it states any cause of action.

MR. PHILLIPS: In the complaint.

THE COURT: If it doesn't state any cause of action -- your amended complaint.

MR. PHILLIPS: Your Honor, you are a fair minded judge --

THE COURT: That's why I am going to go at it in a fair minded way.

MR. PHILLIPS: And that's why I ask you to allow me to depose members of the Donovan, Leisure firm to establish the exact facts that they accompanied me as counsel to me, to Minneapolis to visit me with respect to the very matters upon which I was sued in this court, vindicated, and now apply for indemnification and to establish that the very firm of Donovan, Leisure, Newton Irvine on my behalf represented to this Court that I shoul be paid reasonable expenses including attorneys fees. That is all a matter of testimony.

If I am wrong, it will come back to me wrong. If I am right, it will come back to me right.

Your Honor is entitled to have that before you rule on the issues here.

Now, really, your Honor in simple justice, unpopular as I may be in this courtroom, and I hesitate to think that I am --

THE COURT: Well, you are not --

MR. PHILLIPS: Despite the ad hominem build up that my friend over here has done.

THE COURT: You are not unpopular but you are taking up too much of my time.

MR. PHILLIPS: That makes me unpopular enough. I do ask you to rule that I have a right to depose. I await that decision.

THE COURT: Well, your motion --

MR. PHILLIPS: In aid of my --

THE COURT: -- that I overturn my prior order is denied.

MR. PHILLIPS: I am not asking you for a rehea

jbjw

You have assessed me a hundred dollars in attorneys fees, denied me a rehearing. I am talking about my motion to disqualify which you have not determined.

THE COURT: No, I haven't.

MR. PHILLIPS: Which I ask you, before you do determine to allow me to depose.

THE COURT: Well, I'll take a look at the papers and see whether there is any basis for it. To the extent that I --

MR. PHILLIPS: Would you accept the reply memorandum now because it will establish the legal basis for the facts that I will bring into the record.

THE COURT: I see no basis for it but I think we have heard enough and I have other people who are waiting to be heard.

MR. PHILLIPS: These are the cases on which I rely.

THE COURT: I have people waiting to be heard.

MR. PHILLIPS: Thank you, sir.

MR. BOND: Your Honor, just one question. We were served this week with further papers by Mr. Phillips by Mr. Phillips on the motions going to the merits of the action, the motion to dismiss the amended complaint or for summary judgment.

I would like leave, if I may, to file properly a brief reply to those because they raise some new matters relating to the statute of limitations which may well be the ground on which this case is dismissed.

THE COURT: All right.

MR. BOND: I will do that not later than Monday, if that is all right.

MR. PHILLIPS: May I have the right to cross-reply, sir? I mean, after all, he has had two reply memorandum in already.

MR. BOND: It's my motion and he got the last word anyway.

MR. PHILLIPS: It's my motion, too.

THE COURT: If I want to hear from you, I'll let you know, and again, let me suggest that you proceed with caution. You will be heard, you will be heard but there are other matters before this Court and I think you have had a pretty full opportunity this morning.

MR. PHILLIPS: May I address on one question of personal privilege, sir.

Your Honor made a statement about I should be cautious, not contemptuous with respect to depositions. I handed those papers to your law clerk, Mr. Simon. I understand that I was to proceed in the ordinary course of issuing a notice for deposition. I'll take my oath to that effect. I may have misunderstood it. I didn't deliberately proceed against any advice coming out of chamber indirectly through Mr. Simon.

Secondly, there is no motion to hold Mr. Bond in contempt before this Court, as I have withdrawn that motion. I did not know that the order to vacate had been entered.

MR. BOND: You can't set this chain of events in motion and simply then turn around when it looks like it doesn't have any basis and say, "I withdraw."

MR. PHILLIPS: Your Honor, if he doesn't want it withdrawn, I would like to prepare a motion with chapter and verse.

MR. BOND: You purportedly did that, Mr. Phillips.

MR. PHILLIPS: I am --

THE COURT: Mr. Phillips, please.

MR. PHILLIPS: He bounces back but I --

THE COURT: Well, I am apt to bounce myself, so be careful.

MR. BOND: Thank you, your Honor.

oOo

121

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - x
RANDOLPH PHILLIPS, :

Plaintiff, :

-against- : 72 Civ. 1544 (CHT)

INVESTORS DIVERSIFIED : OPPOSITION AFFIDAVIT
SERVICES, INC.,
:
Defendant.
- - - - - - - - - - - - - - - - - - x

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

RICHARD L. BOND, being duly sworn, deposes and says:

1. I am a member of Marshall, Bratter, Greene, Allison & Tucker, attorneys herein for defendant Investors Diversified Services, Inc. ("IDS"), and am fully familiar with all prior proceedings in this action. This affidavit is in opposition to a motion by plaintiff Randolph Phillips for an order "staying all proceedings herein until the final determination of plaintiff's motion to disqualify Richard L. Bond as attorney for defendant Investors Diversified Services, Inc." and for other relief.

RELEVANT PRIOR PROCEEDINGS

2. The following pending motions and recent decisions are relevant to plaintiff's motion for a stay:

(a) On December 20, 1974, IDS moved to dismiss and/or for summary judgment. That motion is fully submitted, and awaits decision.

(b) On January 17, 1975, Phillips moved for summary judgment and to strike IDS' answer on the ground that it failed to comply with Rule 11 F.R.Civ.P. Those motions are fully submitted and await decision.

(c) On February 4, 1975, Phillips served a motion to disqualify me from continuing herein as counsel for IDS. That motion is fully submitted and awaits decision.

(d) By order to show cause dated February 10, 1975, Phillips sought, inter alia, to reopen the Court's decision to stay pre-trial by plaintiff and to have me cited for contempt. That motion was argued on February 14, 1975. Judge Tenney stated at the argument that he would deny so much of Phillips' motion as sought to vacate his decision of February 7th, staying pre-trial by plaintiff and granting other relief. The portion of Phillips' motion seeking to cite me for contempt awaits decision.

(e) On February 18, 1975, Judge Tenney signed an order which, among other things, stays all pre-trial discovery by plaintiff until after decision on the sub judice motions described in "a" and "b" above.

ALLEGED BASIS FOR THE INSTANT STAY MOTION

3. Phillips' motion to stay all proceedings herein pending "final determination" of his motion to disqualify me is based upon the premises that:

(a) It is the "practice of this Court" to stay all other proceedings when a motion to disqualify opposing counsel has been made (Phillips Affirmation, dated February 18, 1975, ¶¶2-5); and

(b) There allegedly is a "substantial basis for the motion to disqualify Bond" (Id. at ¶14, based upon ¶¶6-13).

GROUNDS FOR OPPOSITION TO STAY MOTION

4. There undoubtedly are circumstances where a stay of other proceedings is appropriate pending disposition of a motion to disqualify counsel; however, in the circumstances of the instant action, the stay sought by plaintiff makes no sense, and I know of no "practice of this Court" which automatically requires a stay upon the mere making of such a motion. Phillips' affidavit recitations of the law are dealt with in IDS' memorandum in opposition to this motion.

5. IDS has moved to dismiss this action on three separate occasions, first in 1972, then in the fall of 1974, and most recently on December 20, 1974. The first two dismissal motions were not decided because of procedural maneuvers initiated by Phillips; the latest IDS motion to dismiss or for summary judgment was made nearly seven weeks before Phillips moved to disqualify IDS' counsel. If IDS is correct in its position that, as a matter of law, Phillips has no claim upon which relief can be granted, there is no possible benefit to anyone in further delaying that determination. Indeed, it is a curious posture for plaintiff, here suing on events of a

decade or more ago, to seek further delay of a judicial determination as to whether he has a claim.

6. Moreover, it is the position of IDS, fully set forth in prior papers opposing the disqualification motion, that Phillips' disqualification motion is frivolous. Among other things, Phillips conceded at the oral argument on February 14, 1975, that he never individually retained Donovan Leisure, never paid a fee to Donovan Leisure, and that he made no claim that I participated in Donovan Leisure's 1960-1961 representation of IDS on which the alleged disqualification is based. Insofar as plaintiff now seeks to reargue his sub judice disqualification motion through the medium of the instant stay motion, that patently is improper. Much of Phillips' affirmation in support of his stay motion is devoted to a supposed demonstration that there is "substantial basis for the motion to disqualify Bond"; although many of Phillips' statements are not accepted by IDS, a detailed refutation is inappropriate since IDS' position is before the Court on the merits of the disqualification motion.

SUGGESTED AVOIDANCE OF POTENTIAL PROBLEMS

7. Plaintiff has strongly hinted that, if his disqualification motion is denied, he intends to appeal (Phillips Affirmation, ¶¶2-5). Coupled with plaintiff's request for a stay of all proceedings until "final determination" of the disqualification motion, he apparently contemplates bringing this case to a halt for some considerable time.

8. There previously have been numerous appeals herein by plaintiff on non-appealable matters, and thereafter plaintiff has contended that decisions by the District Court have been void because jurisdiction was lost upon his filing of notices of appeal in the Second Circuit Court of Appeals. While I

donot believe that such a result should flow from appeal of denial of a disqualification motion, it is urged that any issue as to loss of jurisdiction by the District Court can be avoided by determination of the disqualification motion simultaneously with or subsequent to determination of the other prior motions pending before the Court.

9. Until determination of the motions now before the Court, IDS has no intention of initiating pre-trial discovery or initiating any activity in this lawsuit that even arguably might be inappropriate pending decision on the disqualification motion. Accordingly, there is no need for the stay sought by Phillips.

10. It is respectfully urged that plaintiff's motion to stay all proceedings herein pending final determination of his motion to disqualify me is unnecessary and inappropriate and should be denied.

Richard L Bond
Richard L. Bond

Sworn to before me this
24th day of February, 1975

Beverly Dee [illegible]
Notary Public

[illegible]
Notary [illegible] York
[illegible]
Qualified in [illegible] County
Commission Expires [illegible] 30, 1975

100

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - x

RANDOLPH PHILLIPS, :

Plaintiff, :

-against- : 72 Civ. 1544 (CHT)

INVESTORS DIVERSIFIED SERVICES, INC., : OPPOSITION TO PLAINTIFF'S RULE 9(g) STATEMENT

Defendant. :

- - - - - - - - - - - - - - - - - - x

Defendant Investors Diversified Services, Inc. ("IDS"), pursuant to Rule 9(g) of the General Rules of the Court, respectfully contends as follows in response to plaintiff's statement, in support of his cross-motion for summary judgment, of allegedly material facts as to which plaintiff contends there is no genuine issue:

1. Paragraph 1 of plaintiff's statement does not present facts which are material and distorts the facts therein contained.

2. Paragraphs 2, 3 and 4 of plaintiff's statement do not present facts which are material, and insofar as they seek to equate plaintiff to an attorney at law, there is a genuine issue with respect to them.

3. Paragraph 5 of plaintiff's statement is contrary to the facts, insofar as it contends that Phillips was sued in Count I of the Murchison and Alleghany complaints in Alleghany v. Kirby "by reason of the fact that he was then a director and Chairman of the Finance & Law Committee of the Board of Directors of IDS."

4. Paragraph 6 of plaintiff's statement presents a genuine issue insofar as it is intended to suggest that plaintiff was not fully compensated by IDS for his "full-time services" during the period from September, 1960 through April, 1961.

5. Paragraph 7 of plaintiff's statement presents a genuine issue.

6. Paragraphs 8 and 9 of plaintiff's statement do not present facts which are material, and insofar as they might be viewed as material present genuine issues.

7. Paragraph 10 of plaintiff's statement presents a genuine issue.

Dated: New York, New York
January 27, 1975

Respectfully submitted,

MARSHALL, BRATTER, GREENE,
ALLISON & TUCKER
By____________________
A Member of the Firm
Attorneys for Defendant
Investors Diversified
Services, Inc.
430 Park Avenue
New York, New York 10022

RP

IDS minutes

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RANDOLPH PHILLIPS,

Plaintiff,

-against-

INVESTORS DIVERSIFIED SERVICES, INC.,

Defendant.

---

72 Civil 1544 (CHT)

NOTICE OF APPLICATION FOR A STAY & OTHER RELIEF.

PLEASE TAKE NOTICE that, upon the annexed application for a stay and other relief, and the affidavit of Randolph Phillips, affirmed to herein on February 18, 1975, and the exhibits thereto, plaintiff Randolph Phillips will apply to this Court, pursuant to its powers under Rule 5(b) of the General Rules, on the 28th day of February, 1975, at 10:00 A. M., in Room 1904, United States Court House, Foley Square, New York, N. Y. for an order staying all proceedings herein until the final determination of plaintiff's motion to disqualify Richard L. Bond as attorney for defendant Investors Diversified Services, Inc. and for such other and additional relief as set forth in said affidavit.

Dated: New York, N. Y.
February 18, 1975

YOURS, etc.

RANDOLPH PHILLIPS
Attorney Pro Se
30 East 72nd Street
New York, N. Y. 10021
734-6776

TO: RICHARD L. BOND, ESQ.
430 Park Avenue
New York, N. Y. 10022

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RANDOLPH PHILLIPS, Plaintiff, -against- INVESTORS DIVERSIFIED SERVICES, INC., Defendant.	72 Civil 1544 (CHT) APPLICATION FOR A STAY AND OTHER RELIEF

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Now comes Randolph Phillips, plaintiff herein, and by this affidavit and on the exhibits appended thereto, hereby applies to this Court for a stay of all proceedings herein until the determination of plaintiff's motion, pursuant to Rule 5(b) of the General Rules of this Court, for an order disqualifying Richard L. Bond from appearing herein as attorney for defendant Investors Diversified Services, Inc., and for other relief.

Pending Matters

1. There are now pending before this Court (a) the aforesaid motion to disqualify; (b) defendant's motion for summary judgment; (c) plaintiff's cross-motion for summary judgment; (d) plaintiff's motion to strike the ANSWER of defendant IDS as sham and false in violation of Rule 11 of the Federal Rules of Civil Procedure; and(e) entry of a proposed order by IDS on February 18, 1975 staying plaintiff's depositions of Fred M. Kirby and Joseph Grinnell, Chairman of the Board and General Counsel respectively of defendant IDS, and prohibiting me "from communicating with IDS or with Alleghany Corporation, or with

the officers, directors, employees or agents of either of them, concerning the above-entitled action or matters related thereto, except through counsel herein for IDS and Alleghany Corporation." If said order is entered and this application for a stay has not been acted upon prior thereto or thereafter I shall move for reargument as permitted by the Rules of this Court.

THE BASIS FOR THIS STAY APPLICATION

2. It is the practice of this Court, when a motion to disqualify counsel has been made, to grant a motion for a stay of all other proceedings. A leading authority for the pending motion to disqualify is Emle Industries, Inc. v. Patentex, Inc., 2 Cir. 1973, 478 F. 2d 562. The record in that case shows the following:

> **Decision on Glen Raven's Motion to Stay, Doc. 27**
>
> Motion granted. Rule 26(c), F.R.Civ.P.
>
> New counsel will not be required unless and until the disqualification claim has been established. Proceedings are hereby stayed until the disqualification claim is either properly brought on and promptly adjudicated or withdrawn. See *E.F. Hutton & Co. v. Brown*, 305 F.Supp. 371, 376 (S.D. Texas, 1969).
>
> So Ordered:
> New York, N.Y.
> July 27, 1971
>
> s/ Irving Ben Cooper
> U.S.D.J.

• • •

3. There is also sub judice in the United States Court of Appeals for the Second Circuit the case of Silver Chrysler Plymouth, Inc. against Chrysler Motors Corporation et ano., Docket No. 74-1104. I have examined the briefs in this appeal and discussed the case with counsel for appellant. I am advised that there is in

effect in this case an informal stay of all other proceedings pending the determination on appeal of the motion to disqualify.

4. In addition the Silver case determination may have a precedential effect on the motion herein to disqualify Bond, a former associate of the law firm of Donovan Leisure Newton & Irvine at the time when it was special counsel to myself as Chairman of the Finance & Law Committee of IDS. Appellant in Silver states in his Reply Brief:

> * The District Court's error in creating different standards for the disqualification of partners and associates is demonstrated at DB 26-28. For the principle that the same standard applies to both partners and associates, see also American Bar Association, Standing Committee on Professional Ethics, Informal Opinions Nos. 674 and 691 (July 23, 1963 and October 14, 1963, respectively).

and in addition cites United States v. Standard Oil Company, 136 F. Supp. 345 (S. D. N. Y. 1955) (Kaufman, J.) for the proposition that the "chain of imputed knowledge has been held to extend, not only to the partners in a law firm, but to salaried law clerks in a firm." (136 F. Supp. at 360).

5. An earlier decision in Silver determined that an order refusing disqualification is appealable as of right. (496 F. 2d 800, 2 Cir. 1974, en banc.) The decision there shows (p. 802) that Chrysler obtained a stay of the District Court proceedings until the appeal should be determined.

THE SUBSTANTIAL BASIS FOR THE THE MOTION TO DISQUALIFY ATTORNEY BOND.

6. At oral argument before this Court on February 14, 1975 Bond asserted that the Donovan Leisure Newton & Irvine law firm was counsel in 1960-1961 to IDS but not to Randolph Phillips. I append hereafter as Exhibit A a copy of the minutes of a special meeting of the Board of Directors of Investors Diversified Services,

Inc. held on June 22, 1960 in the offices of Alleghany Corporation at 230 Park Avenue at which I, as a director of IDS was present, along with Fred M. Kirby, also a director and other directors. The minutes show "Also present were * *.* Messrs. Carl Newton, John Tobin and Helmut Furth of the law firm of Donovan Leisure Newton & Irvine." The minutes also show that I with Charles T. Ireland, Jr. was responsible for calling the board meeting.

7. As shown by Exhibit A, "the following resolution was adopted:

> "RESOLVED, That the law firm of Donovan Leisure Newton & Irvine, 2 Wall Street, New York City * * * shall be responsible to the Board and to a special committee thereof hereinafter appointed and known as Finance & Law Committee, and * * *
>
> * * * *
>
> FURTHER RESOLVED, that the Board hereby appoints Messrs. Charles T. Ireland, Jr., Fred M. Kirby and Randolph Phillips a special committee of the Board to be known as the Finance & Law Committee * * * to which Special Counsel shall report, and which shall consult with Special Counsel in the intervals between Board meetings; and which during said interim period shall study and investigate with the aid of Special Counsel the procedures for the analysis, purchase and management, and sale of investments by the Company and by the subsidiary and fund companies," etc.

8. Said Resolution also provided that the Finance & Law Committee was to "elect its own Chairman", and at a subsequent meeting I was so elected by the votes of Messrs. Kirby and Ireland.

9. I have been denied depositions and I have been denied communication by this Court with counsel for IDS, so that I have been unable to obtain a certified copy of the above minutes, but I affirm that Exhibit A to my knowledge is a true and correct copy thereof.

10. At the oral argument before the Honorable Charles H. Tenney on February 14, 1975, this Court apparently accepted the representations of IDS that there was no attorney-client relationship in 1960-1961 between myself as director and Chairman of the Finance & Law Committee and the Donovan law firm. I submit that Exhibit A indisputably establishes that relationship, and shows that the Board of IDS retained the Donovan firm to act as Special Counsel to me as a member of said Committee, and as a member of the Board.

11. It is also indisputable that it was upon the basis of the 1960-1961 activities of myself as director and Chairman of said Committee, based on the advice of the Donovan law firm, that I was sued in Count II of the Murchison complaint in 60 Civil 3511. (Exhibit C to affidavit of Bond, sworn to herein November 7, 1974.) The Donovan law firm has admitted this fact in this Court when it filed on November 14, 1960 in said Murchison case the AMENDED ANSWER OF DEFENDANT ALLAN P. KIRBY, the relevant pages of which I append hereinafter as Exhibit B. * Thus in paragraph 39 of this AMENDED ANSWER the Donovan firm as Attorneys for Defendant Allan P. Kirby allege in answer to the key allegations of Count II that the Finance & Law Committee was appointed "charged with the duty, with the advice and assistance of special counsel" to do certain things and then lists all the things which the Murchison complaint charged Phillips to be doing illegally and asserted the Murchison charges to be brought in bad faith. (Exhibit B, pars. 39(a), (b), (c), (d), (e) and (f).)

12. This present action (72 Civil 1544) is brought for the purpose of obtaining for Phillips reimbursement of his reasonable expenses, including attorneys' fees, in his successful defense of the Count II allegations, and as shown in Exhibit A to the Rule 11 motion

of plaintiff herein, the Donovan law firm on June 21, 1962 represented to this Court Phillips' right to be paid such expenses, and repeated this representation on June 5, 1963.

13. It is not denied that the same "John Tobin * * * of the law firm of Donovan Leisure Newton & Irvine" whose presence is so reported in the IDS Board minutes for the meeting of June 22, 1960 has selected Bond, his former associate in the Donovan firm in 1960-1961, to act as counsel for defendant IDS herein. In complete repudiation of his attorney-client fiduciary obligation to Phillips as an IDS director and member of the Finance & Law Committee, an obligation that prohibits him from acting in an adversary manner to Phillips in his attempt to obtain indemnification for his successful defense of the acts upon which Tobin and the Donovan firm advised him, Tobin by letter dated November 30, 1970 rejected on behalf of IDS and Fred M. Kirby the claim herein asserted by Phillips although his law firm had explicitly represented to this Court prior thereto its validity. And had done so as attorneys for Fred M. Kirby, who now as Chairman of IDS on Tobin's advice, has rejected the claim. Thus Tobin has deliberately created a quarrel between two of his firm's former clients as directors and members of the Finance & Law Committee of IDS, and ignored his conflict-of-interest as attorney.

14. I submit that the above facts amply demonstrate the substantial basis for the motion to disqualify Bond, as the former associate of Tobin and the present instrument for implementing the Tobin letter of November 30, 1970, and Tobin's breach of trust.

15. The rule of law applicable to these facts has been many times stated by this Court and the Second Circuit, and is set forth in plaintiff's memorandum in support of this application for a stay.

16. A substantial basis in law and fact for the motion to disqualify being stated in this affidavit and accompanying memorandum, a substantial basis therefor exists for granting the motion to stay all proceedings herein until the final determination of the motion to disqualify and enjoin Richard L. Bond from acting as attorney for defendant Investors Diversified Services, Inc. *

RANDOLPH PHILLIPS

Affirmed to before me this
18 day of February, 1975.

TONU A. ESPENBERG
Notary Public, State of New York
No 31-[illegible]
Qualified in [illegible] County N.Y
Commission Expires March 30, 1976

---

* Plaintiff also respectfully requests that the exhibits herein appended be considered as evidence in support of the motion to disqualify.

EXHIBIT A

AGENDA
FILE
1

Draft No. 1
Draft Date - June 27, 1960

INVESTORS DIVERSIFIED SERVICES, INC.
SPECIAL MEETING OF THE BOARD OF DIRECTORS
June 22, 1960

A special meeting of the Board of Directors of Investors Diversified Services, Inc. was held on Wednesday, June 22, 1960, at 2:30 p. m. in the offices of Alleghany Corporation, 230 Park Avenue, New York, New York. Such special meeting was called by the Secretary of the Corporation pursuant to the written request of Messrs. Charles T. Ireland, Jr. and Randolph Phillips, directors of the Corporation.

The following directors, constituting a quorum, were present:

Joseph M. Fitzsimmons
W. Grady Clark
William E. Eppler
Charles T. Ireland, Jr.
Allan P. Kirby, Jr.
Fred M. Kirby
John D. Murchison
Randolph Phillips
Walter J. Tuohy

Also present were Mr. John W. McCartin, Vice President-Law of the Corporation, and Messrs. Carl Newton, John Tobin and Helmut Furth of the law firm of Donovan, Leisure, Newton and Irvine.

Mr. Joseph M. Fitzsimmons, President of the Corporation, presided and Mr. Thomas L. Kenealy, Secretary of the Corporation, acted as Secretary of the meeting.

The Chairman called on the Secretary to read the notice of the meeting and after the notice was read the Secretary was instructed to attach a copy of such notice to the minutes of the meeting.

The directors discussed at length the events leading to the call of the special meeting by Messrs. Ireland and Phillips. After such discussion a resolution proposed by Mr. Grady Clark was read by the Secretary to the directors. The motion for the adoption of such resolution was seconded by Mr. Allan P. Kirby, Jr. The directors then agreed to recess for fifteen minutes to allow for the preparation of additional copies of the proposed resolution so that each director might have a copy. At 4:05 p. m. the meeting reconvened. After further discussion of the matter the following resolution was adopted:

> RESOLVED, That the law firm of Donovan Leisure Newton and Irvine, 2 Wall Street, New York City, be and it hereby is retained and employed as counsel to represent and defend the Company in the action of Archer and Gilbert v. IDS et al, No. 60 Civil 1963, now pending in the United States District Court for the Southern District of New York and that said firm shall be responsible to the Board and to a

EXHIBIT A

special committee thereof hereinafter appointed and known as the Finance & Law Committee, and

FURTHER RESOLVED, That the officers of the Company be and they are hereby directed and instructed to cooperate with said counsel and committee and to make available to them all facts, data, documents and other information which said counsel and committee may deem relevant to said litigation or on any aspect thereof, and

FURTHER RESOLVED, That the said firm of Donovan Leisure Newton and Irvine be and it hereby is retained and employed as Special Counsel to the Company, with authority to recommend compliance with all pertinent federal regulatory legislation and other federal legal and regulatory requirements, and with authority to investigate and become familiar with, insofar as deemed advisable by said counsel, all aspects of the Company's business and operations, and those of the subsidiary and fund companies, which said Special Counsel deem to be relevant to the discharge of its legal responsibilities and to select and, on behalf of the Company, with the assent of the Committee hereinafter appointed, to retain and employ such other counsel and experts as it may deem desirable to assist it and to protect the Company's interest under federal and state law and regulation, and from time to time to make such recommendations to the Board as in their judgment are requisite or desirable in order to insure full compliance with all requirements of federal and state regulation and law, and

FURTHER RESOLVED, That the officers of the Company be and they hereby are directed and instructed to cooperate fully with said Special Counsel and Committee and to make available to them all facts, data, documents and other information which said Special Counsel and Committee deem to be pertinent to the appropriate discharge of their responsibilities, and

FURTHER RESOLVED, That the Vice President-Law, General Counsel and legal staff of the Company be and they hereby are directed and instructed to cooperate fully with said Special Counsel, and

FURTHER RESOLVED, That the Board hereby appoints Messrs. Charles T. Ireland, Jr., Fred M. Kirby and Randolph Phillips a special committee of the Board to be known as the Finance & Law Committee, and including the President of the Company as an ex-officio member thereof, to which Special Counsel shall report, and which shall consult with Special Counsel in the intervals between Board meetings; and which during said interim period shall study and investigate with the aid of Special Counsel the procedures for the analysis, purchase, management, and sale of investments by the Company and by the subsidiary and fund companies, and the procedures for the management and placement of said Company's Custodian and Deposit Accounts and any other assets; and

EXHIBIT A

said Committee is directed to formulate recommendations for any changes in such procedures for submission to the Board at its earliest convenience; and

FURTHER RESOLVED, That such Finance & Law Committee will function as a Committee, elect its own Chairman, and that no single member of the Committee may act independently of the Committee, except by authorization of the Committee, and

FURTHER RESOLVED, That any prior resolution of the Board of Directors insofar as it may be inconsistent with this resolution is hereby rescinded and annulled.

Messrs. Clark, Eppler, Fitzsimmons, Ireland, Allan P. Kirby, Jr., Fred M. Kirby, Phillips and Tuohy voted in favor of the resolution and Mr. John D. Murchison voted against the adoption of the resolution.

The directors then discussed the advisability of setting the date for the next meeting of the Board. After discussion, on motion duly seconded, the following resolution was unanimously adopted:

RESOLVED, That a special meeting of the Board of Directors of the Corporation be held at the offices of Alleghany Corporation, 230 Park Avenue, New York City, not earlier than July 5, 1960 nor later than July 12, 1960, the exact date to be set by the President of the Corporation, for the purpose of considering and acting upon a report from the Finance & Law Committee and to consider any other business that may properly come before the meeting.

There being no further business to come before the meeting it was, on motion duly seconded, adjourned.

T. L. Kenealy
Secretary

RP
P. 12

Filed
Nov. 14, 1960

BEST COPY AVAILABLE

EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------------------------------------x

JOHN D. MURCHISON and CLINT W. MURCHISON, JR., co-partners, d/b/a Murchison Brothers, and GERARD L. FOSSLAND, as stockholders of Alleghany Corporation, on behalf of themselves and all other stockholders similarly situated,

Plaintiffs,

v.

ALLAN P. KIRBY, RANDOLPH PHILLIPS, FRED M. KIRBY, CHARLES T. IRELAND, JR., CHARLES T. HILL, ALFRED E. PERLMAN, WILLIAM C. RABE, JOSEPH M. FITZSIMMONS, ANTHONY SMITH and ALLEGHANY CORPORATION,

Defendants.

---------------------------------------x

AMENDED
ANSWER OF DEFENDANT
ALLAN P. KIRBY

The defendant Allan P. Kirby (hereafter "Kirby"), by his attorneys, for his Amended answer to the Complaint herein, shows:

1. The Complaint in its First Count fails to state a claim upon which relief can be granted.

2. The Complaint in its Second Count fails to state a claim upon which relief can be granted.

3. The Court lacks jurisdiction of this action, for the reason that parties indispensable to a determination of the action have not been joined in the Complaint.

4. Admits and avers on information and belief that plaintiffs John D. Murchison and Clint W. Murchison, Jr. (hereafter sometimes "the plaintiffs Murchison") are residents of the State of Texas, that they hold themselves out as doing business as "Murchison Brothers," that since on, or about March 15, 1960 each of them has been the registered owner of 5,000 shares of 6% Convertible Preferred stock of Alleghany; that the Gerard L. Fossland is, and since on or about May 8, 1959 has been the registered owner of 500 shares of common stock of Alleghany;

38. Admits and avers that the stock of IDS is not listed upon any national stock exchange but is quoted over-the-counter; that on April 18, 1960, the reported prices quoted were 215 bid and 229 asked; that on April 20, 1960 the reported prices were 185 bid and 201 asked; and denies each and every other allegation of Paragraph 59 of the Complaint.

39. Answering Paragraphs 61, 62, and 63 of the Complaint: avers

(a) that on April 19, 1960 nominees of Alleghany were elected to the IDS Board in replacement of certain previous directors, thereby effectuating that portion of the Court order in the *Zenn* state action providing for return of working control of IDS from the Murchisons to Alleghany Corporation;

(b) thereafter the Board of Directors of IDS on June 22, 1960 appointed a Finance and Law Committee from its membership charged with the duty, with the advice and assistance of special counsel, of making recommendations to the company to assure that IDS in all its activities would comply fully with all applicable laws and regulations. The defendants Fred M. Kirby, Ireland and Phillips were appointed members of such Committee, and subsequently the defendant Phillips was elected Chairman thereof. The President of IDS has at all times been an ex-officio member of such Committee. The plaintiff John D. Murchison, then a director of IDS, was the only director who voted against the authorization and appointment of such Committee;

(c) thereafter in discharge of its assigned duties and responsibilities such Committee undertook to investigate certain facets of the handling of IDS affairs with a view to making recommendations to the company to assure full compliance with all applicable laws and regulations. As a result of developments ensuing upon said investigation, including acts of insubordination in the refusal of one vice-president to honor the directions of the IDS board, certain then officers of IDS were removed from their offices and said individuals subsequently resigned as officers of the affiliated fund companies. In connection with the removal of two IDS vice-presidents by the board of IDS, whichever of the Murchison plaintiffs was present at the board meeting at which the matter arose voted against the removal; the President of IDS was removed as such after the commencement of the investigation and on reports of his ill health, and whichever of the Murchisons was present concurred in his removal;

(d) in the course of its further investigations the IDS Finance and Law Committee ascertained the existence of conduct by certain officers (now removed) and by a Murchison designated director (now resigned) of IDS and of affiliated fund companies, which said officers and directors were under financial and other obligations to the Murchisons and acted at the direction of and in concert with the Murchisons, which conduct on information and belief entailed the improper utilization of certain uninvested corporate credits for the personal profit and benefit of the Murchisons and those acting in concert with them in abuse of their respective fiduciary positions; said conduct and improper utilization of uninvested corporate credits for the personal benefit and profit of the Murchisons and others acting in concert with them has now been brought to an end and said improprieties have now been eliminated as a result of the investigation of the said IDS Finance and Law Committee appointed June 22, 1960 over the opposition of the Murchisons, by the IDS board nominated by Alleghany;

(e) the removal of such officers from their positions in IDS was further based upon the judgment of the directors of IDS that such officers had not contributed materially to the growth and success of IDS and/or its affiliated fund companies, but had in fact hampered said growth by curtailing the opportunities for further constructive accomplishments for IDS and the said fund companies of other officers who had theretofore contributed very materially to the growth and success of IDS and its affiliated fund companies. Under Alleghany control certain of said latter officers have now been restored to positions of opportunity to influence favorably the affairs of said companies, and the management of IDS has been improved and strengthened;

(f) these charges are asserted, and this action is brought in bad faith by the plaintiffs

(i) as a part of a continuing plan by the Murchisons and others to prevent the continuance of the investigation by the IDS Finance and Law Committee into the manner of the conduct of the affairs of IDS and affiliates during the period from early 1955 to April 19, 1960 when IDS was under the control of the Murchisons; and

(ii) in retaliation for the acts of Alleghany-nominated IDS directors (other than the Murchisons) in bringing to light and terminating and correcting irregularities and improprieties which had occurred under the Murchisons' personal influence, and in removing officers who were under personal financial obligation to the Murchisons and who had aided the Murchisons in their personally self-serving objectives and activities; and

(iii) for the purpose of recapturing control of the IDS Board by the Murchisons and to place thereon a majority of persons compliant with their wishes, despite the Murchisons' now demonstrated lack of a sense of public and fiduciary responsibility commensurate with the public and fiduciary obligations and responsibilities of IDS; and

(iv) for the purpose of impugning the integrity and good faith of the Alleghany-nominated IDS Board (except the Murchisons who have now recently been removed from said Board by action of Alleghany Corporation and other IDS stockholders at a special meeting called for that purpose), by the device of making in a complaint filed with this court, false and irresponsible charges of fraud and of giving wide publicity to said charges;

(g) except as so alleged, denies each and every allegation of paragraphs 61, 62 and 63.

FIRST AFFIRMATIVE DEFENSE

40. For a first affirmative defense, this defendant avers that this action seeks to set aside only those portions of the orders, judgments and releases incident to the settlement of the *Zenn* and the *Briggs* actions which relate to defendant Allan P. Kirby. At the same time, plaintiffs seek to preserve the remaining portion of such documents which operated to release the other defendants in the *Zenn* and the *Briggs* actions. An action seeking to level such a piecemeal attack on the interdependent proceedings and the documents incident to and consummating the settlement of these actions cannot be maintained.

SECOND AFFIRMATIVE DEFENSE

41. For second affirmative defense, this defendant avers that further prosecution of the *Zenn* state action, or of the *Briggs* federal action, or of any purported derivative action by any stockholder of Alleghany seeking relief based upon any of the matters and things alleged, referred to or embraced in the

RP

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Filed Jan 24 75

RANDOLPH PHILLIPS,

Plaintiff,

-against-

INVESTORS DIVERSIFIED SERVICES, INC.,

Defendant.

----

72 Civ. 1544 (CHT)

STATEMENT UNDER Rule 9(g) of the General Rules of this Court by Plaintiff

Plaintiff Randolph Phillips, in support of his cross-motion for summary judgment and in opposition to the motion of defendant Investors Diversified Services, Inc. for summary judgment, contends that no genuine issue of material fact exists to be tried with respect to the following:

1. The law firm of Donovan Newton Leisure & Irvine, as attorneys for Allan P. Kirby, Sr. and Fred M. Kirby, the family controlling defendant Investors Diversified Services, Inc. and the largest stockholders in Alleghany Corporation which then and now controlled IDS, the law firm now being General Counsel for IDS, represented to this Court on June 21, 1962, that it make "an order granting defendant * * * Randolph Phillips, the expenses, including reasonable attorneys' fees" incurred in his defense to date of Count II of the complaint in Murchison et ano. v. Kirby, et al., 60 Civil 3511 in this Court; and on June 5, 1963, after trial of the new amended and supplemental complaint of Alleghany Corporation v. Kirby, et al., in said 60 Civil 3511, which resulted in a final judgment dismissing

it, the Donovan law firm repeated this representation to this Court but extended it to the entire action.

2. That in defending against said complaints Randolph Phillips acted as attorney pro se.

3. That in acting as attorney pro se Phillips acted as an "attorney" within the definition of CPLR s 105(c).

4. That Roy W. McDonald, Esq. was Chief Counsel for the Kirby defendants on behalf of the Donovan law firm in 60 Civil 3511, and on October 5, 1960 he wrote Phillips, stating, "I equate your pro se appearance to the appearances by counsel."

5. Phillips was sued in Counts I and II of the Murchison and Alleghany complaints and amended and supplemental complaint by reason of the fact that he was then a director and Chairman of the Finance & Law Committee of the Board of Directors of IDS.

6. That at no time from September 3, 1960 through to the entry of final judgment on June 5, 1963 in 60 Civil 3511 did Phillips receive any compensation or any other benefits from IDS in connection with the defense of himself in said 60 Civil 3511.

7. That in said defense of himself Phillips spent a minimum of 1,899 hours during 245 days.

8. That in Zenn v. Anzalone, 46 Misc. 2d 378, he and two attorneys were awarded $1,250,000 compensation, Phillips' share being $408,000 for 6800 hours time expended, or $60 per hour. This award was for services rendered in the years prior to 1960-1963.

9. That Phillips has been compensated by at least 7 Federal Circuit and District Judges for services rendered as attorney pro se in the district courts, courts of appeal and Supreme Court of the United States.

10. That the 1,899 hours of time expended by Phillips in his defense in 60 Civil 3511 was an actually or necessarily incurred expense in the same sense that an expenditure of time in defending a party is an actual or necessarily incurred expense by an attorney at law.

Dated: New York, N. Y.
January 17, 1975

Respectfully submitted by

RANDOLPH PHILLIPS,
Attorney pro se.
30 East 72nd Street
New York, N. Y. 10021

Filed Jan 24 78

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RANDOLPH PHILLIPS,

Plaintiff,

-against-

INVESTORS DIVERSIFIED SERVICES, INC.,

Defendant.

72 Civ. 1544 (CHT)

Plaintiff's affidavit in opposition to defendant's motion to dismiss and/or for summary judgment, and in support of plaintiff's cross-motion for summary judgment.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Randolph Phillips, being duly affirmed, hereby deposes and says: I am the plaintiff herein, and I make this affidavit in opposition to the motion of defendant Investors Diversified Services, Inc. to dismiss and/or for summary judgment, and in support of plaintiff's motion for summary judgment. I hereby allege that

1. The law firm of Donovan Newton Leisure & Irvine, as attorneys for Allan P. Kirby, Sr. and Fred M. Kirby, the family controlling defendant Investors Diversified Services, Inc. and the largest stockholders in Alleghany Corporation which then and now controlled IDS, the law firm now being General Counsel for IDS, represented to this Court on June 21, 1962, that it make "an order granting defendant * * * Randolph Phillips, the expenses, including reasonable attorneys' fees" incurred in his defense to date of Count II of the complaint in Murchison et ano. v. Kirby, et al., 60 Civil 3511 in this Court; and on June 5, 1963, after trial of the new amended and supplemental complaint of Alleghany Corporation v. Kirby, et al., in said 60 Civil 3511, which resulted in a final judgment dismissing

it, the Donovan law firm repeated this representation to this Court but extended it to the entire action.

2. That in defending against said complaints Randolph Phillips acted as attorney _pro se_.

3. That in acting as attorney _pro se_ Phillips acted as an "attorney" within the definition of CPLR s 105(c).

4. That Roy W. McDonald, Esq. was Chief Counsel for the Kirby defendants on behalf of the Donovan law firm in 60 Civil 3511, and on October 5, 1960 he wrote Phillips, stating, "I equate your _pro se_ appearance to the appearances by counsel."

5. Phillips was sued in Counts I and II of the Murchison and Alleghany complaints and amended and supplemental complaint by reason of the fact that he was then a director and Chairman of the Finance & Law Committee of the Board of Directors of IDS.

6. That at no time from September 8, 1960 through to the entry of final judgment on June 5, 1963 in 60 Civil 3511 did Phillips receive any compensation or any other benefits from IDS in connection with the defense of himself in said 60 Civil 3511.

7. That in said defense of himself Phillips spent a minimum of 1,899 hours during 245 days.

8. That in _Zenn_ v. _Anzalone_, 46 Misc. 2d 378, he and two attorneys were awarded $1,250,000 compensation, Phillips' share being $408,000 for 6800 hours time expended, or $60 per hour. This award was for services rendered in the years prior to 1960-1963.

9. That Phillips has been compensated by at least 7 Federal Circuit and District Judges for services rendered as attorney _pro se_ in the district courts, courts of appeal and Supreme Court of the United States.

10. That the 1,399 hours of time expended by Phillips in his defense in 60 Civil 3511 was an actually or necessarily incurred expense in the same sense that an expenditure of time in defending a party is an actual or necessarily incurred expense by an attorney at law.

Dated: New York, N. Y.
January 17, 1975

Respectfully submitted by

RANDOLPH PHILLIPS,
Attorney pro se.
30 East 72nd Street
New York, N. Y. 10021

Affirmed to before me this

17th day of January, 1975.

JOHN W. STRATER
Notary Public, State of New York
No. 24 4502963
Qualified in Kings County
Commission Expires March 30, 1975

1ff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RANDOLPH PHILLIPS,
Plaintiff,
-against-
INVESTORS DIVERSIFIED SERVICES, INC.,
Defendant.

72 Civ. Action 1544 (CHT)

SUPPLEMENTAL AFFIDAVIT
of Randolph Phillips

To 5th chase Room 6

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

RANDOLPH PHILLIPS, being duly affirmed, hereby deposes and says: I am the plaintiff herein and I make this affidavit to supplement my affidavit herein affirmed to January 17, 1975 in support of my motion for summary judgment so as to include material that was inadvertently omitted from that affidavit.

1. I append hereinafter the relevant pages from an affidavit of J. Howard Carter, Esq., sworn to March 30, 1962 in this Court in Murchison et al. v. Kirby et al., 60 Civil 3511, which show that Count II of the complaint therein was in active and vigorous litigation in this Court at said time. (Exhibit A to this affidavit)

2. I append hereinafter the relevant pages from my PRE-TRIAL MEMORANDUM in 60 Civil 3511 which show that pre-trial discovery relating to the justification of my activities as a director and Chairman of the Finance & Law Committee of IDS continued until February, 1963. (Exhibit B to this affidavit). That MEMORANDUM dated March 22, 1963 shows that I was prepared to prove at the trial the bad faith of the allegations that my activities as IDS director and

Chairman were pursuant to a "bribe" and that the entire Murchison-Alleghany lawsuit was a camouflage to hide the Murchison brothers' attempt to recapture control of IDS from Alleghany Corporation; that they had a secret deal with the late Robert R. Young, then Chairman of Alleghany, to maintain de facto control of IDS after making a de jure return of control; that they wanted to recapitalize IDS to reduce Alleghany's voting control and increase their own voting power; and to return to a course of using IDS's assets to strengthen and augment their own financial empire. As long as I was a director and Chairman of IDS, they knew they could not realize these goals, and they imperatively desired to stop the investigation of the Finance & Law Committee which was unearthing their previous acts of maladministration of the $3 billion IDS complex of mutual fund companies; and which was thus frustrating their hidden goals.

3. I was also prepared to prove that William E. Eppler, who was originally a nominee to IDS of Allan P. Kirby, Sr. and who was the source and sole source of the "bribery" charges against me was and for 5 years had been secretly on the IDS payroll when IDS was under Murchison control at a salary of $45,000 per year. *

4. Thus while the Updike firm's "discovery" with respect to the Count II charges in the complaint may have ceased in April, 1961, my discovery and that of my co-defendants of evidence to rebut those charges continued unremittingly against Count II and its surviving paragraphs in the amended and supplemental complaint until February, 1963, and then were followed by the aforesaid MEMORANDUM and preparation for trial. All of this work and intensive research was done in defense of this action against me as an IDS director and Chairman.

---

* Eppler's deposition, which was taken by defendants in 60 Civil 3511 began in November, 1961 and concluded in May, 1962.

5. The law firm of Donovan Leisure Newton & Irvine, General Counsel for IDS, acted for me as my attorneys in my role of Chairman of the Finance & Law Committee, and a member of the firm John E. Tobin attended one or more of the meetings of the Board of Directors of IDS to assist me and advise me at that meeting or meetings. Another member of the firm, Walter E. Stratton, attended as my attorney the meetings I conducted as Chairman of the Finance & Law Committee.

6. Mr. Tobin, my former counsel, chose Richard L. Bond, the IDS attorney of record herein, to oppose my application in this proceeding. Mr. Bond formerly was associated with the Donovan firm.

7. Thus I am being opposed herein by my former counsel in these matters through Mr. Bond and without my consent, a fact which I at the appropriate time will ask this Court to act upon in accordance with the established standards of professional conduct. In this connection I also call the Court's attention to my motion under Rule 11 of the Federal Rules of Civil Procedure to strike the ANSWER of IDS as "sham and false".

Randolph Phillips
RANDOLPH PHILLIPS

Affirmed to before me this

22nd day of January, 1975.

Adele Huff

ADELE HUFF
Notary Public, State of New York
No. 41-4517523
Qualified in Queens County
Commission Expires March 30, 1976

Exhibit A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---x

JOHN D. MURCHISON and CLINT W. MURCHISON, JR., co-partners, d/b/a Murchison Brothers, and GERARD L. FOSSLAND, as stockholders of Alleghany Corporation, on behalf of themselves and all other stockholders similarly situated,

Plaintiffs,

-against-

Civil Action
No. 60-3511

ALLAN P. KIRBY, RANDOLPH PHILLIPS, FRED M. KIRBY, CHARLES T. IRELAND, JR., CHARLES T. HILL, ALFRED E. PERLMAN, WILLIAM G. RABE, JOSEPH M. FITZSIMMONS, ANTHONY SMITH and ALLEGHANY CORPORATION,

Defendants.

---x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

J. HOWARD CARTER, being duly sworn, says:

1. I am a member of the firm of Townley, Updike, Carter & Rodgers, attorneys for plaintiffs herein. I have been in charge of this matter since its inception and am completely familiar with the facts, circumstances and proceedings to date.

2. I make this affidavit in opposition to defendants' motion pursuant to Federal Rule 34 for an order permitting inspection and copying of the stenographic transcript of an interview of William E. Eppler conducted by attorneys for plaintiffs during our factual investigation preparatory to filing the complaint herein. The interview was conducted on September 2, 1960 and the complaint was filed September 8, 1960.

8. It is unquestionable that Mr. Eppler's advice and counsel was sought by both Mr. Young and Mr. Kirby for a great many years. The testimony is clear that Mr. Eppler aided Mr. Young in the affairs of IDS until the time of his death in 1958 and thereafter gave advice and counsel to Mr. Kirby, who succeeded Mr. Young in the Alleghany empire. In paragraph 10 of the moving affidavit, however, defendants attempt to imply a fiduciary duty owing by Eppler to Kirby. It is even asserted that "Eppler's testimony is replete with references to conversations, meetings and correspondence in this period with Kirby, Ireland and Kirby's then attorneys, Lord, Day & Lord." The affidavit conveniently ignores the fact that Lord, Day & Lord were during that period also the attorneys for Alleghany Corporation, of which Mr. Eppler was a director. The implication that Eppler was solely concerned with Kirby's welfare during that period by reason of the confidences involved is therefore flatly improper

9. In paragraph 11, "in the interests of brevity", the moving affidavit fails to assert the extended testimony adduced with respect to the events in Alleghany and IDS subsequent to December 1959 which are relvant and material to the issues of this law suit. Moreover, it, in noting Mr. Eppler's break with Kirby, completely fails to call attention to the advent of Randolph Phillips on the Board of IDS and his destructive activities on the Finance and Law Committees of IDS. These matters are pleaded in the complaint and a mass of documentary materials has been adduced in support of the allegations of the complaint with respect to the activities of Phillips, Ireland and Kirby during the spring and summer of 1960. The moving affidavit wholly fails in paragraph 11 to recite the

course of events that led Mr. Eppler to take a strong and proper stand against Mr. Kirby's support of Phillips and Ireland's program in IDS, thus leading to a break between Mr. Kirby and Mr. Eppler. "In the interest of brevity" therefore the moving affidavit is misleading.

AS TO EPPLER'S RELATIONSHIP TO THIS LITIGATION

10. On pages 5 through 10, the moving affidavit, attempts to create the impression of a causal connection between Eppler's resignation as a director of IDS, Alleghany and the New York Central (Par. 12) and the Murchisons decision to investigate doing something in court about the manner in which Kirby, Ireland and Phillips were behaving in IDS. These paragraphs completely ignore the fact that Mr. Eppler had a long standing relationship to IDS, had put considerable effort into its organization and management and had acted in many respects as Alleghany's liaison in IDS with Murchison Brothers, the largest shareholders in IDS other than Alleghany. In an effort to create something sinister about Eppler's summer 1960 discussions with representatives of Murchison Brothers of IDS problems stemming from the activities of Kirby, Ireland and Phillips through Alleghany, the moving affidavit apparently would gloss over the concern Mr. Eppler, as a man who had labored long and hard in the interests of that corporation on the one hand, and Murchison Brothers, the principal stockholders on the other, necessarily would have in the affairs of IDS.

11. In sum, the moving affidavit seeks to imply that the purpose of the discussions did not stem from concern for the well-being of IDS in which Mr. Eppler had invested eight years and Murchison Brothers $50 million but from a mutual

✓ vindicative hostility toward the defendants. There is no support whatever in the transcript of Mr. Eppler's deposition for such an innuendo.

AS TO PLAINTIFFS' RELIANCE UPON EPPLER AS A WITNESS

12. While Mr. Eppler unquestionably is a principal witness in this matter because of his intimate and detailed knowledge of the facts, defendants' efforts in their moving affidavit to create the illusion that Mr. Eppler is the only witness in support of the allegations of conspiracy and that plaintiffs have placed their sole "reliance upon Eppler to support the conspiracy alleged," is grossly misleading. It neglects the series of admissions made by defendants during their depositions as well as the numerous documents adduced in support of the complaint. Moreover, defendants' attempt to mislead by ignoring the numerous witnesses who have knowledge of relevant facts but who have not yet been deposed, e.g., Newton, Teitelbaum, Graubard, Daily, Fitzsimmons, etc. ✓✓ ✓

AS TO FAILURE TO SHOW INCONSISTENT STATEMENTS

13. On pages 11 through 13 the moving affidavit asserts that Mr. Eppler has given inconsistent testimony:

> (a) with respect to Mr. Teitelbaum's withdrawal from the case upon discovery of an arrangement between Kirby and Phillips;
>
> (b) with respect to a mid November 1959 meeting which Ireland interrupted stating that he had a proposition from Phillips who would take his deal elsewhere unless there was immediate action; and,

Defendants undoubtedly would have the court believe that this was a script prepared for Mr. Eppler. √√ Actually, however, Mr. Eppler has testified (Tr. 750) that the memorandum was prepared by himself !!! in answer to defendants subpoena in an effort to be a helpful and willing witness.

39. In support of their charge of gross hostility defendants merely cite the foregoing theories, none of which, as I have noted, bears scrutiny in the record.

40. I submit therefore that defendants have wholly failed to make out a factual showing of failure to remember, inconsistent statements, and vindicativeness or hostility. Their motion for production of Exhibit 53 which is admittedly attorneys' work product should, therefore, be denied.

J. Howard Carter

Sworn to before me this
30th day of March, 1962.

Adelaide R. O'Neill

ADELAIDE R. O'NEILL
Notary Public, State of New York
No. 03-[illegible]
Qualified in Bronx County
Cert. Filed in New York County
Commission Expires March 30, 1962

Exhibit B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALLEGHANY CORPORATION,

Plaintiff,

-against-

60 Civil 3511

ALLAN P. KIRBY, RANDOLPH PHILLIPS, CHARLES T. IRELAND, JR. and FRED M. KIRBY,

Defendants.

PRE-TRIAL MEMORANDUM OF DEFENDANT RANDOLPH PHILLIPS

Randolph Phillips, Pro Se
128 East 70th Street
New York 21, N. Y.

March 22, 1963.

The Murchisons and their lawyers plan to destroy the $5,000,000, or more, value of the return of IDS control to Alleghany.

On June 22, 1956 the Murchison defendants, represented by Mr. Adams in the settlement talks then being held with the Breswick plaintiffs, represented by Mr. Brussel, agreed to return control of IDS to Alleghany by reversing a transaction in which, without consideration for the surrender of voting rights, Alleghany in 1955 had delivered to Murchison Brothers 130,000 shares of IDS common (voting) stock in return for 130,000 shares of IDS Class A (non-voting) stock. The 1955 transaction, following upon the heels of a 1953 transaction in which Alleghany sold to Murchison Brothers on credit and inadequate collateral 24% of IDS voting stock, (Plaintiff Ex. 5, pp 1-2) had vested in the latter almost majority voting control of IDS. Alleghany retained, however, some 143,572 voting shares, and the agreement to return 130,000 additional shares would bring, when consummated, the total to 273,572 shares out of a total outstanding of 574,540, or about 47.6%. (Def. Ex. 30, pp. 5-6; Def. Kirby Ex. 155-4D)

The Special Master's Report of November 17, 1958 to this Court recounts:

> "Throughout the State Court hearings on the adequacy of the proposed settlement, Brussel's associate counsel, Graubard, attacked this (130,000 share exchange) transaction as a "pay-off to the Murchisons" for their aid to the defendants Young and Kirby in acquiring control of the New York Central Railroad. Accordingly, throughout the entire negotiations counsel for plaintiffs herein persistently demanded that the Murchisons rescind the transaction by returning to Alleghany the 130,000 shares of voting stock and receiving back their non-voting stock.
>
> 'On June 22, 1956, during the course of the negotiations, defendants acquiesced in this demand of Brussel. In the course of the negotiations, Daly, of counsel to Young and Kirby, pointed out to Brussel, of counsel for the plaintiffs, that in the State Court proceeding before the undersigned as Referee, Graubard, Brussel's associate, had valued the return of control of IDS to Alleghany at $5,000,000." (Def. Ex. 30, p. 6)

It was almost solely because of this $5,000,000 valuation that the Special Master found that 'the new offers of settlement (of only $300,000 more cash on top of Pomerantz's $700,000, plus return of IDS control) are indeed substantial." (Id., p. 15)[x/] Mr. Graubard testified on deposition

---

[x/] The Referee states in his report to the State Court that "counsel for the Breswick plaintiffs (Mr. Brussel) in the Federal Court action has conceded that such rescission is worth more than $1,750,000." (p. 121) This figure by Mr. Brussel was a minimum, using only one test, an actual price used in one transaction in 1956, by the Murchisons. Between 1956 and December 1959, the price of IDS tripled in value.

that a group represented by Governor Dewey was willing to pay $6,000,000 for voting control of IDS, but Young was not interested. (pp 446-447) "*** this was an asset which I valued not in terms of power, but in terms of market value. It was a salable asset, and it was salable in my opinion for many millions of dollars." (p. 280) Obviously, therefore, it was and still is of vital importance to the Breswick plaintiffs, their counsel, and Phillips, as well as all the Alleghany stockholders (except the Murchisons) that the value of IDS control not be diluted by the Murchisons' proposed recapitalization plan under which Alleghany's 47.6% voting power would be reduced to the very percentage it had been when the 5-year old litigation began, namely, 24%, by making all of the stock voting. It was also vitally important that a bona fide restoration of control in fact as well as form be made to Alleghany. Mr. Brussel and Phillips and Graubard thus became seriously concerned when they began to hear rumors that no such bona fide return was intended and that, indeed, a secret deal existed between Robert R. Young and the Murchisons to maintain the control in the hands of the latter, even though pro forma control was returned. (Graubard deposition, pp. 403,) "I was convinced that any rescission of voting control which placed voting control of IDS in Alleghany was not likely to be honored unless we saw to it that it was honored." (p. 403) The reality of these fears is shown by the following note by William E. Eppler marked as defendant Ireland's Exhibit 192:

> "1 - RY said to WEE in October 1957 that APK was incompetent to manage Alleghany alone and for that reason he was much worried. Furthermore, he said he expected to continue M Bros in control of management of IDS regardless of return of Board control to AY."

Three months after October 1957 Young died on January 25, 1958. The very next month the Murchisons went to work seeking to either enforce a secret deal with Kirby to allow them to maintain actual control of IDS after its return to Alleghany or to get his consent to their "welshing" on their public pledge. On February 26, 1958 David W. Wallace, Vice President of Alleghany, transmitted to Attorney Daly of Lord, Day & Lord, the following exhibit (Plaintiff 217) which appears to be from a letter to Kirby:

Zenn vs Anzalone

February 26, 1958

The Murchison group met with their attorneys in Mexico the other day and is morning Don Carter called me in New York from Palm Beach. He asked if he ld see me when I returned to Palm Beach and I said yes. I will report on is meeting at a later date.

Frank Adams, Murchison's lawyer, asked if Tom Daly (Lord, Day & Lord) and could meet with he and his partner, Bill Stockhausen, at lunch today. I said s and we all lunched together at the University Club.

Evidently Murchisons are reluctant to go through with that part of the rivative suit settlement offer concerning return of control of IDS to Alleghany. ey say that this was acceptable when Mr. Young was alive and the continued ntrol of Alleghany by yourself and Mr. Young was assured. They stated you were t interested in remaining in the Alleghany picture. I told them that there was o indication that you intended to dispose of your holdings in Alleghany and had stated to me a present intent to hold on. The same thing could be said for the Young interest. They then stated that there is currently active correspondence between you and a possible buyer for your Alleghany and Central holdings. They went on to say that you were seeking offers for the sale of these securities.

Further, they said Murchisons were greatly disturbed by your failure to see John Murchison on his recent trip to New York. Murchisons feel that this may mean a change in the friendly business relationship of the past between themselves and Alleghany.

Mr. Daly pointed out that we (the defendants) were, in his view, probably all bound to go through with the settlement offer or face, at the very least, protracted litigation on the point. Stockhausen disagreed with this view and Adams said that they felt that they would like us to consider an alternative by which they could either return control of IDS or, if they chose, substitute a cash payment ($300,000 was tentatively mentioned).

I told them not to do anything until I saw Carter in Palm Beach and until I had a chance to communicate with you. I do not think this is a fit topic for radio telephone conversation but I do think we should answer once and for all their statements about your interest in Alleghany. I realize that in some ways it is no one's business but your own what you do with your stocks but in view of the delicate nature of this matter I would strongly recommend an answer. I naturally assume that you want control of IDS back, I certainly do, and do not want any cash payment in lieu of returned IDS control. Mr. Daly and I feel that the situation can be kept under control for the next few weeks until we hear from you.

Tom -
For your file
DWR

P.G.
EXHIBIT
2/5/63
217
JH

It is important to note that Murchisons' lawyers, and not the Murchisons themselves, were in the first instance "reluctant to go through with that part of the derivative suit settlement offer concerning return of control of IDS to Alleghany." The idea to renege or "welsh" on the settlement offer already before the Courts originated in the mind of Adams' law partner, William Stockhausen, who apparently was responsible for having obtained the lucrative Murchison account and feared to lose it. When Stockhausen came back from his vacation in August 1956 and found out about the June 22, 1956 offer allegedly made in "good faith" to return control of IDS, "I opposed". (Stockhausen dep., p. 52). Since Murchison had only acquired control in 1955 it "seemed rather silly *** to turn right around and turn it back." Despite the firm offer to the Breswick plaintiffs, participated in by his partner Adams, Stockhausen was adamant against "surrendering control", so much so that he finally persuaded his clients, who prior thereto had no such objection, to re-open the matter privately with Young later that year at a conference in Dallas. Young "opposed violently" any attempt to "try to undo this part of the settlement". (pp 56, 58) "I kept voicing my objections to the transfer of control, and wasn't there some other way that Mr. Phillips and Mr. Graubard and Mr. Young would be satisfied, and nothing could be done to budge them." (p. 60) The "them" could not refer to Phillips and Graubard, because they were not informed by the Murchisons or their lawyers as to Stockhausen's objections.

The Murchison lawyers privately propose that their clients renege on their commitment to return IDS control and prepare to destroy its $5,000,000 value by "a recapitalization" plan, while publicly proclaiming the "good faith" of the offer of rescission to this Court.

Stockhausen and Adams, frustrated first by the adamant refusal of Young to agree to a formal withdrawal of the settlement offer, then frustrated anew after Young's death on January 25, 1958, concocted a scheme to recapitalize IDS so that all of its outstanding stock would be made voting shares. IDS then had outstanding and still does 547,540 shares of common (voting) stock and 879,181 shares of common stock Class A (non-voting stock). Stockhausen proposed that the two classes of stock, each of which have identical rights except as to voting, be reclassified into one class totaling 1,426,721 voting shares "so that all IDS (would) be made voting" (Stockhausen deposition, p. 106). Thus Alleghany, which owned only 83,889 non-voting shares and was to own an additional 273,572 voting shares (absent recapitalization) upon return of the 130,000 IDS shares, would still have only 24% of the total outstanding IDS voting stock, the same percentage it had prior to the institution of the Breswick litigation to obtain return of IDS control, and it would not have the 47.6% proposed in the public offer of settlement. The scheme, in short, would undo the $5,000,000 value which Mr. Graubard had placed on the return of IDS control, leaving Alleghany percentage-wise with the exact percent of voting shares it held when the Breswick action had begun and *after* the transfer of the control complained of. And the 130,000 shares of non-voting stock to be returned to the Murchisons under the June 22, 1956 settlement offer *would increase in value* by reason of becoming a 9% block invested with voting rights, and together with another 5% block held by the Murchsion Brothers would give them personally a 14% voting block. In actual fact, however, these shares when added to other shares held by Murchison lawyers, associates, and friends with whom they placed the stock during their period of IDS control (1955 to April, 1960) would give them more than the 24% vote held by Alleghany. (Witness: Phillips) Since there were 879,181 shares of non-voting stock outstanding and only 547,540 shares of voting stock, it is also obvious that the common stock as a class would lose control of the company to the holders of the Class A stock.

The Graubard-Phillips-Brussel fears in 1959 of a bad faith return of IDS control are confirmed. On January 3, 1963, the Murchison lawyer, Stockhausen, admits for the first time in public the true reason for the recapitalization plan: It would enable the Murchisons "to start a proxy fight" in IDS.

Stockhausen at the 1963 deposition admitted that this scheme, which in fact was approved by the IDS board of directors, under Murchison control, after the 1961 proxy contest (S. E. C. Investment Company Act Release No. 3485, June 11, 1962), was his brain-child. He did not advance it during Young's life, but immediately after his death. On or about February 18, 1958 (less than a month after Young's death) Stockhausen and Adams met with the Murchisons in Mexico. (Stockhausen dep., p. 105; pltff ex. 217). " **** we wanted to get out of the re-transfer of control of IDS to Alleghany, or at least put some time limit on the settlement, how long our offer would remain open **** (p. 105) (Stockhausen proposed *as an alternative* that) " all IDS stock be made voting" (p. 106), the " suggestion came from me" (p. 107), " **** it would give the Murchisons a substantial voice in IDS, and I would say, at least, if they saw fit, *to start a proxy fight*" (p. 107).

Thus the admitted purpose of the scheme was to destroy the certainty of control being vested in Alleghany, and to dilute back to the pre-litigation status the percentage of voting stock to be held by Alleghany. In short, the entire 5-year litigation on this point was to be rendered useless.

This proposal was advanced only orally to Kirby or Wallace by the Murchison lawyers from February 1958 to early December, 1959. On December 15, 1959 it was formally proposed to Kirby in a letter of that date by John D. Murchison, which after a certain amount of self-serving declarations was candid enough to admit, "Of course, our concern for the IDS stockholders is not wholly unselfish either." (Def. Ex. 8).

After failure of Murchison and Alleghany counsel to quiet fears of a bad faith return of IDS control, the Breswick plaintiffs' request in 1959 that Phillips be elected a "watchdog" IDS director, to insure the bona fides of the rescission.

There was no "secret" about the Breswick plaintiffs' concern relating to the integrity of the proposed return of IDS. Thus Mr. Brussel, in both briefing and arguing before Judge Dimock in April, May and June 1959 stated that at a minimum the Alleghany shareholders were entitled to effective restoration of de facto and de jure control of IDS and that any experienced corporate lawyer would so insist. Only this would prevent an about-face return of effective control to the Murchisons. Mr. Brussel stated that Murchison and Alleghany counsel's rejection of the voting trust was evidence of Alleghany's inexplicable unwillingness to protect its shareholders. (Supplemental Brief of Breswick Plaintiffs in June 1959, pp. 16 and 17; oral argument, May 1959; defendants' exhibit 69A, pages 99-100.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RANDOLPH PHILLIPS,

Plaintiff,

-against-

INVESTORS DIVERSIFIED SERVICES, INC.,

Defendant.

72 Civil 1544 (CHT)

NOTICE OF MOTION

PLEASE TAKE NOTICE that, upon the record herein and the annexed affidavit of Randolph Phillips, affirmed to February 4, 1975, plaintiff Randolph Phillips will move this Court, on the 14th day of February, 1975, at 10:00 A. M., in Room 1904, United States Court House, Foley Square, New York, N. Y., for an order, pursuant to Rule 5(b)(4) of the General Rules of this Court, disqualifying Richard L. Bond, attorney of record herein for defendant Investors Diversified Services, Inc., from appearing herein as attorney for said defendant and preliminarily and permanently enjoining him from so doing.

Dated: New York, N. Y.
February 4, 1975.

RANDOLPH PHILLIPS
Attorney Pro Se
30 East 72nd Street
New York, N. Y. 10021
734-6776

TO: Richard L. Bond
Attorney for Defendant
Investors Diversified Services, Inc.
430 Park Avenue, New York, N. Y. 10022

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RANDOLPH PHILLIPS, 72 Civil 1544 (CHT)

Plaintiff, AFFIDAVIT

-against-

INVESTORS DIVERSIFIED SERVICES, INC.,

Defendant.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

RANDOLPH PHILLIPS, being duly affirmed, hereby deposes and says: I am the plaintiff herein and I make this affidavit in support of my motion, pursuant to Rule 5(b)(4) of the General Rules of this Court, for an order disqualifying Richard L. Bond, attorney of record herein for defendant Investors Diversified Services, Inc., from appearing herein as attorney for said defendant and preliminarily and permanently enjoining him from so doing. The facts in support of this motion are:

1. On June 22, 1960 the Board of Directors of IDS, of which I was a member, appointed a Finance and Law Committee from its membership charged with the duty, with the advice and assistance of special counsel, of making recommendations to the company to assure that IDS in all its activities would comply fully with all applicable laws and regulations. Fred M. Kirby, Charles T. Ireland, Jr. and myself were appointed members of such Committee, and subsequently I was elected Chairman thereof.

2. Said special counsel was the law firm of Donovan Leisure Newton & Irvine, of which John E. Tobin, a member thereof, and Walter L. Stratton, an associate thereof, were assigned to give me and my associates the aforesaid legal advice and assistance.

3. The Donovan law firm also assigned partners Carl E. Newton and Granville Whittlesey to give me legal advice and assistance with respect to problems arising out of my duties as Chairman of the Finance & Law Committee, and they with Tobin and Stratton did so from June 22, 1960 until some time in April, 1961.

4. Said Committee under my Chairmanship was active during substantially all of this period of time with the aforesaid legal advice and assistance of the Donovan law firm.

5. During this same period of time Richard L. Bond, the attorney of record herein for defendant IDS, was an associate of the Donovan law firm.

6. Although I wrote Bond by letter served upon him January 22, 1975 asking him to advise me "the years that you were employed by the Donovan Leisure Newton & Irvine law firm, and what your relationship, if any, was to Mr. John E. Tobin of that firm", he has refused to answer that inquiry.

7. The present lawsuit is substantially related to the matters wherein the law firm of Donovan Leisure Newton & Irvine represented me as Chairman of the Finance & Law Committee and as a director of IDS. In fact, despite its legal advice and assistance I was sued in Murchison et al. v. Kirby et al., 60 Civil 3511 with respect to the very matters on which it provided such legal advice and assistance. (Exhibit C to affidavit of Bond, sworn to herein November 7, 1974, allegations under Count II).

8. This action arises out of the fact that when I wrote to IDS under date of June 16, 1970 requesting payment of my reasonable expenses, including attorneys' fees for my successful defense of 60 Civil 3511, my former attorney John E. Tobin wrote back on Donovan Leisure letterhead on November 30, 1970 rejecting the claim. He also stated in

said claim rejection that he was doing so on behalf of Mr. Fred M. Kirby who is Chairman of the Board of Directors of IDS and who on June 21, 1962 represented to this Court in said *Murchison* case by said Donovan Leisure firm that it should make "an order granting defendant * * * Randolph Phillips, the expenses, including reasonable attorneys' fees" incurred in his defense to date of Count II of the Murchison complaint; and on June 5, 1963 Kirby again represented through said law firm by letter to the Judgement Clerk of this Court that defendants had a right to such indemnification and in so stating he did not state defendants, except Randolph Phillips but clearly inthe light of his June 21, 1962 representation he included Randolph Phillips in that right.

9. As a result of my former attorney Tobin's hostile acts in so advising Kirby to reject my claim and in writing to me said claim rejection letter, I was compelled to institute this action in April 1972.

10. Tobin, who delayed 5 months in answering my letter of June 16, 1970, now delayed 19 days after the service of the complaint in selecting an attorney to defend against it. At that point he selected Bond, who some time earlier had left the Donovan law firm when he failed of promotion to partner, to be the attorney of record herein and to do everything necessary to defeat the claim which had arisen as aforesaid out of my defense of acts taken on his law firm's and his, Tobin's, advice as attorney.

11. It seems clear that Tobin, because of his previous attorney-client relationship with me as aforesaid, was disqualified from appearing in this lawsuit on behalf of defendant IDS. He therefore is attempting to do indirectly through Bond as the attorney of record what he is disqualified from doing directly.

12. Tobin is also through Bond, as though the practice of law was a game of musical chairs, attempting to repudiate the representations in 1962 and 1963 by Kirby through the Donovan Leisure law firm to this Court in 60 Civil 3511 that I was entitled to indemnification as aforesaid. Thus Bond is now representing to this Court that what Kirby said as a defendant in 1962 and 1963 through the mouth of his Donovan Leisure law firm is not binding thereafter when Kirby, now Chairman of IDS, seeks to repudiate Kirby the defendant through the Donovan law firm and its appointed attorney herein.

13. I submit that as a matter of professional ethics the Donovan Leisure law firm may not be allowed to act in an adversary position to myself in these matters arising out of our former attorney-client relationship, and that it may not evade this bar by having its former associate Bond do that which it is disqualified to do. That Bond has been selected by Tobin for this purpose is too obvious to need any elaboration except to call to this Court's attention that during the years prior to 1970 to date the Donovan Leisure law firm has been General Counsel for IDS, and Tobin has been the partner in charge of the account.

WHEREFORE, I, Randolph Phillips, as plaintiff herein, respectfully move this Honorable Court for an order, pursuant to Rule 5(b)(4) of the General Rules of this Court, disqualifying Richard L. Bond, attorney of record herein for defendant Investors Diversified Services, Inc., from appearing herein as attorney for said defendant, and preliminarily and permanently enjoining him from so doing.

RANDOLPH PHILLIPS

Affirmed to before me this

4 day of February, 1975.

Anne Klaus

ANNE KLAUS
Notary Public, State of New York
No. [illegible]
Qualified in Queens County
Certificate filed in New York County
Term Expires March 30, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RANDOLPH PHILLIPS, 72 Civil 1544 (CHT)

Plaintiff, AFFIDAVIT (REPLY)

-against-

INVESTORS DIVERSIFIED SERVICES, INC.,

Defendant.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

RANDOLPH PHILLIPS, being duly affirmed, deposes and says: I am the plaintiff herein and I make this affidavit in support of my motion for summary judgment and in opposition defendant's motion for summary judgment, and in support of my motion under Rule 11 of the Federal Rules of Civil Procedure to strike the ANSWER herein as sham and false.

1. I was repeatedly informed by counsel for Alleghany Corporation and Charles T. Ireland, Jr., its President and an attorney, after entry of judgment on June 5, 1963 in Alleghany Corporation v. Kirby, 60 Civil 3511 in this Court, that no applications for reimburement of reasonable expenses, including attorneys' fees, would be entertained by Judge Dawson or, after he died, in August 1964, any successor Judge while any appeal from that judgment was pending undetermined.

2. After the initial decision of the Court of Appeals handed down in May, 1964, affirming the judgment below, I discussed the matter with Ireland and filed an application. But he informed me that due to the pendency of a petition for rehearing en banc, I should not prosecute my motion in the federal court and I withdrew by stipulation without

prejudice the application on October 13, 1964 with the approval and upon order of Judge Cooper.

3. Throughout the period thereafter until the final decision of the Supreme Court of the United States on May 31, 1966 I was induced by counsel for Alleghany and IDS or by the acts of Ireland, his representations or conduct as President of Alleghany and Chairman of the Executive Committee of the Board of Directors of IDS, to delay filing any application seeking such relief in this federal court.

4. When acting on my own judgment, instead of his advice, I did file an application in the New York State Supreme Court I was rebuffed by that Court dismissing it for lack of subject matter jurisdiction.

5. On January 13, 1975 Richard L. Bond, attorney for IDS and previously for Alleghany Corporation herein, admitted to me on the telephone that he had never seen the whole record in Murchison or Alleghany Corporation v. Kirby et al., 60 Civil 3511. He stated in this call that he had only seen "pieces of the record." When I asked Bond for access to this record, he refused, and told me to obtain it by the usual legal processes and then obtained a stay from this Court of my notices to depose Fred M. Kirby, defendant in 60 Civil 3511, and Joseph Grinnell, General Counsel of IDS. Thus my hands are bound and I am unable to discover necessary evidence to rebut the allegations of fact he has has made in his affidavits respecting the above-mentioned motions now pending in this Court.

RANDOLPH PHILLIPS

Affirmed to before me this
10 day of February, 1975.

William Klass

WILLIAM KLASS
Notary Public, State of New York
No. 41-7257220 Queens County
Certificate filed in New York County
Term Expires March 30, 1976

30

DISTRICT COURT
FILED
JUN 30 1975
S. D. OF N. Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

------------------------------------- x

RANDOLPH PHILLIPS, :

Plaintiff, :

-against- : 72 Civ. 1544 (CHT)

INVESTORS DIVERSIFIED SERVICES, INC., : ORDER

Defendant. :

------------------------------------- x

Plaintiff having appealed to the United States Court of Appeals for the Second Circuit from an order entered herein on the 19th day of February, 1975, wherein plaintiff's notices to depose defendant Investors Diversified Services, Inc. were vacated; plaintiff was stayed from initiating and conducting any pre-trial discovery herein until ten (10) days after service of notice of entry of an order deciding the sub judice motions herein by Investors Diversified Services, Inc. to dismiss and/or for summary judgment and by plaintiff for summary judgment and to strike the answer of Investors Diversified Services, Inc.; plaintiff was ordered to pay to defendant Investors Diversified Services, Inc. the sum of One Hundred Dollars ($100.00) as costs and expenses incurred by it in making said motion; and plaintiff was prohibited from communicating, orally or in writing, with Investors Diversified Services, Inc. or Alleghany Corporation, or with the officers, directors, employees or agents of either of said corporations, concerning the above-entitled action or

MICROFILM

matters related thereto, except through counsel herein for said corporations;

AND plaintiff's aforesaid appeal having been dismissed by the Court of Appeals for the Second Circuit by order entered on the 20th day of May, 1975, for lack of jurisdiction and for plaintiff's failure to comply with the Federal Rules of Appellate Procedure, with costs to defendant Investors Diversified Services, Inc., and its mandate having issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

NOW, upon the said mandate of the Court of Appeals for the Second Circuit, it is ORDERED, ADJUDGED AND DECREED:

1. That plaintiff's aforesaid appeal be and hereby is dismissed.

2. That this cause hereby is restored to the docket of this Court for further proceedings.

3. That defendant Investors Diversified Services, Inc. have execution for costs as taxed by the Court of Appeals in the sum or $25.20.

Dated: June 25, 1975
New York, New York

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - x
RANDOLPH PHILLIPS, :

Plaintiff, :

-against- : 72 Civ. 1544 (CHT)

INVESTORS DIVERSIFIED : NOTICE OF ENTRY
SERVICES, INC.,
:
Defendant.
- - - - - - - - - - - - - - - - - x

SIR:

PLEASE TAKE NOTICE that the within is a true copy of an Order signed February 18, 1975 by the Honorable Charles H. Tenney, duly filed and entered in the Office of the Clerk of this Court on February 19, 1975.

Dated: New York, New York
February 20, 1975

Yours, etc.,

MARSHALL, BRATTER, GREENE,
ALLISON & TUCKER

By____________________
A Member of the Firm
Attorneys for Defendant
Investors Diversified
Services, Inc.
430 Park Avenue
New York, New York 10022
212 421-7200

TO:
Mr. Randolph Phillips
Plaintiff Pro Se
30 East 72nd Street
New York, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - x

RANDOLPH PHILLIPS, :

Plaintiff, :

-against- : 72 Civ. 1544 (CHT)

INVESTORS DIVERSIFIED SERVICES, INC., : **ORDER**

Defendant.

- - - - - - - - - - - - - - - - - - x

Defendant, Investors Diversified Services, Inc. having moved this Court by an Order to Show Cause, issued February 4, 1975, for an order:

> (1) Pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, vacating the notice of deposition served by plaintiff Randolph Phillips on January 31, 1975, to depose defendant Investors Diversified Services, Inc. ("IDS"), by Fred M. Kirby, Chairman of the Board of Directors, commencing on February 7, 1975, and staying plaintiff from initiating or conducting any pretrial discovery herein, including the aforesaid noticeddeposition, until ten (10) days after service of notice of entry of an order deciding the *sub judice* motions herein by IDS to dismiss and/or for summary judgment and by plaintiff for summary judgment and to strike IDS' answer to the amended complaint;

(2) Pursuant to the general equity powers of the Court, for the costs and expenses, including reasonable attorneys' fees, incurred by IDS in making this motion; and

(3) Pursuant to the general equity powers of the Court, prohibiting plaintiff from communicating with IDS or with Alleghany Corporation, or with the officers, directors, employees or agents of either of them, concerning the above-entitled action or matters related thereto, except through counsel herein for IDS and Alleghany Corporation;

and said motion having come on for hearing before this Court on February 7, 1975, and plaintiff having defaulted and failed to file papers in opposition or to appear at the hearing of said motion;

NOW, upon reading and filing the aforesaid Order to Show Cause issued on February 4, 1975, the affidavit of Richard L. Bond, sworn to on February 4, 1975, and the exhibits annexed thereto, the supplemental affidavit of Richard L. Bond, sworn to on February 5, 1975, and the exhibit annexed thereto, all in support of said motion, together with proof of service upon plaintiff of all the foregoing papers;

AND, this matter having come on to be heard for argument on February 7, 1975, and plaintiff having defaulted and failed to appear at said argument, and due deliberation having been had thereon, and this Court having orally rendered its decision on February 7, 1975.

NOW, on motion of Marshall, Bratter, Greene, Allison & Tucker, attorneys for defendant Investors Diversified Services, Inc., it is hereby

ORDERED, that the notice of deposition served by plaintiff Randolph Phillips on January 31, 1975, to depose defendant Investors Diversified Services, Inc., by Fred M. Kirby, Chairman of the Board of Directors, commencing on February 7, 1975, be,and the same hereby is, vacated; and it is further

ORDERED, that the notice of deposition served by plaintiff Randolph Phillips on February 4, 1975, to depose defendant Investors Diversified Services, Inc. by Joseph F. Grinnell, Vice President and General Counsel, commencing on February 11, 1975, be,and the same hereby is,vacated; and it is further

ORDERED, that plaintiff Randolph Phillips be, and hereby is, stayed from initiating and conducting any pre-trial discovery herein, until ten (10) days after service of notice of entry of an order deciding the sub judice motions herein by Investors Diversified Services, Inc. to dismiss and/or for summary judgment and by plaintiff for summary judgment and to strike the answer of Investors Diversified Services, Inc.; and it is further

ORDERED, that plaintiff Randolph Phillips, within ten (10) days after service upon him of a conformed copy of this order, shall pay to defendant Investors Diversified Services, Inc. as costs and expenses, including reasonable attorneys' fees, incurred by it in making this motion, the sum of One Hundred Dollars ($100.00); and it is further

ORDERED, that plaintiff Randolph Phillips be, and hereby is, prohibited from communicating, orally or in writing, with Investors Diversified Services, Inc. or Alleghany Corporation, or with the officers, directors, employees or agents of either of said corporations, concerning the above-entitled action or matters related thereto, except through counsel herein for said corporations.

Dated: New York, New York
February 18, 1975

U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RANDOLPH PHILLIPS, Plaintiff, -against- INVESTORS DIVERSIFIED SERVICES, INC., Defendant.	72 Civ. 1544 (CHT) MEMORANDUM

APPEARANCES

RANDOLPH PHILLIPS, Pro Se
30 East 72nd Street
New York, New York 10021

MARSHALL, BRATTER, GREENE, ALLISON & TUCKER
Attorneys for Defendant
430 Park Avenue
New York, New York 10022

Of Counsel: RICHARD L. BOND, ESQ.
DAVID S. GREENFELD, ESQ.

TENNEY, J.

In this action by plaintiff Randolph Phillips ("Phillips") to recover the "reasonable value" of his services as successful attorney pro se in an earlier suit, a number of motions are currently pending. Defendant Investors Diversified Services, Inc. ("IDS") has moved for a dismissal of the amended complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure ("Rules") or, in the alternative, for summary judgment under Rule 56. Plaintiff has moved under Rule 11 for an order striking the answer to the amended complaint as a "sham" and "false."[1] In addition, Phillips has produced a customary flurry of motions aimed at opposing counsel rather than at the issues of this protracted litigation: in particular, he has moved to disqualify IDS's counsel, Richard L. Bond, to stay all other actions until such disqualification motion is determined, and to declare Bond in contempt for making a false affidavit. For the reasons stated below, all of plaintiff's motions are denied, and defendant's motion for summary judgment is granted in its favor.

History of the Action

The origins of this case reach back several decades. At an earlier stage of the controversy, over 12 years ago, the United States Court of Appeals for the Second Circuit prefaced an opinion, "For some ten years, the subject matter of the lawsuit now on appeal has been before the New York State and federal courts." Alleghany Corp. v. Kirby, 333 F.2d 327 (2d Cir. 1964), aff'd on rehearing en banc, 340 F.2d 311 (2d Cir. 1965), cert. dismissed, 384 U.S. 28 (1966). reh. 967 (May 31 [illegible] Judicial involvement with this matter began in the Spring of 1954, when eight shareholders' derivative actions were filed in New York state court on behalf of Alleghany Corporation ("Alleghany") against various of its officers and directors challenging the propriety of an exchange of securities, including shares of IDS, between the corporation and certain shareholders. Further actions were subsequently filed in the Southern District of New York. See Alleghany Corp. v. Kirby, 218 F. Supp. 164, 173-79 (S.D.N.Y. 1963), aff'd, 333 F.2d 327 (2d Cir. 1964), aff'd on rehearing en banc, 340 F.2d 311 (2d Cir. 1965), cert. dismissed, 384 U.S. 28 (1966). The state court actions were settled with court approval in late December of 1959, and a judgment dismissing the actions on the merits as to all parties was entered on June 21, 1960. Id. at 179; cf. Zenn v. Anzalone, 17 Misc. 2d 897, 191 N.Y.S.2d 840 (Sup. Ct. 1959). Phillips, plaintiff in the instant case, had not been a party but acted as a consultant to several of the parties defendant in the settled actions and ultimately received a substantial fee award for those services. Amended Complaint ¶ 22; see Zenn v. Anzalone, 46 Misc. 2d 378, 259 N.Y.S.2d 747 (Sup. Ct. 1965). On April 19, 1960, following the conclusion of the state court litigation, Phillips was elected to the Board of IDS. Alleghany Corp. v. Kirby, supra, 218 F. Supp. at 181.

The second round of litigation, and the one with which this case is directly concerned, involved another shareholders' derivative action commenced in federal court on September 8, 1960. The original complaint contained two counts. The first alleged that Allan P. Kirby, Charles T. Ireland, Jr. and Phillips had reached a secret agreement to give Phillips a "position of status and compensation in return for assisting in securing a settlement" of the state court actions, which agreement acted as a fraud upon the court. Complaint, Alleghany Corp. v. Kirby ¶¶ 1-49, appended as Exhibit C to Affidavit of Richard Bond, sworn to December 20, 1974. The second contended that the election of Phillips as an IDS Director and his service in this position and as Chairman of IDS's Finance and Law Committee harmed the corporation and its shareholders in a variety of ways. Id. ¶¶ 50-69. Phillips's directorship ended on April 25, 1961, and his position as Chairman of the Finance and Law Committee was terminated as of May 31, 1961. Affidavit of Joseph F. Grinnell ¶¶ 2-3, sworn to November 4, 1974, appended as Exhibit E to Affidavit of Richard Bond, sworn to December 20, 1974. Thereafter, on December 18, 1962, an amended and supplemental complaint was filed, dropping the allegations of the second count and adding allegations which did not concern Phillips. Alleghany Corp. v. Kirby, supra, 218 F. Supp. at 167. On May 28, 1963 Judge Dawson of this court dismissed the complaint, finding, inter alia, that Alleghany had "failed completely" to establish the existence of any secret agreement between Phillips, Kirby and Ireland. Id. at 181-82. The dismissal as to Phillips was not appealed by Alleghany, although a long a protracted appeal was pursued as to Kirby and Ireland. Amended Complaint ¶ 15; see Alleghany Corp. v. Kirby, 333 F.2d 327 (2d Cir. 1964), aff'd *on rehearing en banc*, 340 F.2d 311 (2d Cir. 1965), *cert. dismissed*, 384 U.S. 28 (1966).

Plaintiff commenced this action in April 1972, asking for attorney's fees for his successful pro se defense in *Alleghany Corp. v. Kirby*. The case developed quickly and confusedly due to a less-than-fortuitous combination of the Master Calendar System and the overly aggressive quality of Phillip's active pro se practice.[2] This Court, after receiving this case "for all purposes," entered an order allowing defendant IDS to amend its motion to dismiss and staying plaintiff Phillips from conducting any discovery pending resolution of IDS's motion. *Phillips v. Investors Diversified Services, Inc.*, 72 Civ. 1544 (CHT) at 9-10 (S.D.N.Y. Aug. 28, 1974). On December 10, 1974, the Court, upon stipulation of the parties, permitted the filing of an amended complaint. A subsequent order, dated February 18, 1975, affirmed the earlier order that Phillips refrain from pretrial discovery pending resolution of IDS's motion to dismiss and/or for summary judgment and Phillips's motion under Rule 11. Following Phillips's unsuccessful appeal of the section of the interlocutory order which prohibited him from communicating directly with IDS or Alleghany, the case was restored to the docket of this Court for further proceedings.

Disqualification Motion

Before ruling on plaintiff's substantive motions, the Court must briefly consider Phillips's motion for disqualification of IDS's attorney Richard L. Bond ("Bond"). Phillips bases his motion largely on the fact that Bond was an associate in the firm of Donovan Leisure Newton & Irvine ("Donovan Leisure") at the same time that Phillips served as Chairman of the Finance and Law Committee of IDS and that Donovan Leisure served as special counsel to IDS and worked with the committee. The standard in this circuit for disqualification of counsel because of prior legal representation of a now-adverse client is well established: "'[W]here any substantial relationship can be shown between the subject matter of a former representation and that of a subsequent adverse representation, the latter will be prohibited.'" Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751, 754 (2d Cir. 1975), quoting T.C. Theatre Corp. v. Warner Brothers Pictures, Inc., 113 F. Supp. 265, 268 (S.D.N.Y. 1953). This prohibition fulfills the purpose of enforcing the lawyer's duty of absolute fidelity and guarding against the danger of inadvertent use of confidential information. Id. This Court has substantial doubt as to whether the subject matter of the instant action is substantially related to any representation of IDS by Donovan Leisure. That issue need not be reached, however, for Phillips's motion may be denied on the ground that there is no relationship between Bond's current representation of IDS and Donovan Leisure's representation of IDS in 1960-61. In Silver Chrysler Plymouth, the court of appeals stated the rule governing this particular situation: "while this Circuit has recognized that an inference may arise that an attorney formerly associated with a firm himself received confidential information transmitted by a client to the firm, that inference is a rebuttable one." Id. In Silver Chrysler Plymouth, the court of appeals found that the former associate had rebutted the inference by his denial that he had been entrusted with any such confidences which was supported by the affidavits of two colleagues from his former law firm. Id. at 756-57.

The rebuttal of the inference in the instant case is at least as strong as that in Silver Chrysler Plymouth. Bond has made the following statement under oath: "I am as certain as one can be after the passage of fifteen years that I had no participation of any kind in Donovan Leisure's 1960-1961 IDS representation to which Phillips points." Bond Affidavit ¶ 7, sworn to February 13, 1975. Furthermore, it would seem that Phillips himself recognizes this fact. In a hearing before this Court on February 14, 1975, the following colloquy transpired:

> "THE COURT: [Bond] wasn't there? I thought one of your problems was that he was there and he was participating.

"MR. PHILLIPS: No, sir. He was an associate of Donovan, Leisure, Newton & Irvine.

"THE COURT: But he didn't know in what way you were represented or anything else?

"MR. PHILLIPS: He was not part of the team that went out to Minneapolis with me.

"THE COURT: All right. That's on the record."

Transcript at 20-21. Insofar as the disqualification motion rests on Bond's former association with Donovan Leisure, it must fail.

Phillips has sought additional support for his motion in his contention that Donovan Leisure, through its "selection" of Bond to serve as counsel to IDS for purposes of this motion, "is attempting to do indirectly through Bond as the attorney of record what [it] is disqualified from doing directly." Phillips Affidavit ¶ 11, sworn to February 4, 1975. This argument is only one more example of Phillips's consistent practice of conducting litigation by impugning the integrity of opposing counsel as well as that of judges[3/] and must fail. Bond is a member of the firm of Marshall, Bratter, Greene, Allison & Tucker ("Marshall, Bratter"), a substantial firm with more than 70 attorneys and offices in New York and Washington and who, it must be assumed, are in control of their own litigation matters. Phillips cites the case of Cord v. Smith, 338 F.2d 516 (9th Cir. 1964), as support for his argument. There, however, the court was confronted with an attorney whose disqualification was obviously necessary but who would not withdraw from his challenged representation in the court of appeals although he had purportedly withdrawn in the district court. Thus, substantial doubt existed as to the completeness of that attorney's withdrawal. Id. at 521-25. No such circumstances are presented here. Donovan Leisure is not involved in the representation of IDS in this matter; Marshal, Bratter has been defendant IDS's attorney in this case since its beginning in 1972. Accordingly, Phillips's motion for disqualification is denied.

Summary Judgment Motion

In bringing this action for recovery of the "reasonable value of his services in defending against the charges" in Alleghany Corp. v. Kirby, Phillips has alleged causes of action based on statutory indemnification, agency, implied or quasi-contract and quantum meruit. In addition, he alleges that IDS's failure to pay him attorney's fees as an attorney pro se and the defendant's resistance to such a recovery in this Court constitutes a denial of the equal protection of the laws guaranteed by the fourteenth amendment to the United States Constitution and an attempt to deprive Phillips of due process of law under the fifth amendment. The Court concludes that defendant is entitled to judgment under all of the substantive theories alleged by plaintiff and that plaintiff's constitutional objections are without merit.

This Court, sitting in diversity jurisdiction, is bound to apply state substantive law. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938). In their briefs, the parties have discussed the issues under both the law of New York, the residence of the plaintiff and the location of all the legal proceedings with which the instant action is concerned, and the law of Minnesota, the state of incorporation of the defendant. In choosing between these laws, this Court is bound to follow the applicable choice-of-law rules of New York, the state in which the Court is located. See Day & Zimmermann, Inc. v. Challoner, 423 U.S. 3, 4 (1975); Klaxon Co. v. Stentor Electric Manufacturing Co., 313 U.S. 487, 496 (1941). In this particular case, however, no elaborate inquiry is necessary into the complex and still-developing choice-of-law principles of New York State. See, e.g., Rosenthal v. Warren, 475 F.2d 438, 440-46 (2d Cir.), cert. denied, 414 U.S. 856 (1973). Here the applicability of New York law is clearly established by New York statute and Minnesota case law.

The relevant New York statutory provisions are the corporate indemnification sections of the New York General Corporation Law. These sections were enacted into law on April 18, 1945, 1945 New York Laws ch. 869, and remained in force until September 1, 1963, at which time they were replaced by Sections 722, 725 and 726 of the New York Business Corporation Law. See 1961 New York Laws ch. 855 as amended by 1962 New York

Laws ch. 819 and 1963 New York Laws ch. 689. Thus, they were in force during the pendency of Alleghany Corp. v. Kirby insofar as that action concerned Phillips since the action was begun on September 8, 1960 and was concluded as to Phillips when the final judgment was entered on June 5, 1963.

Section 64 of the New York General Corporation Law provided in pertinent part:

> "Any person made a party to any action, suit or proceeding by reason that he ... is or was a director, officer or employee of a corporation shall be entitled to have his reasonable expenses, including attorneys' fees, actually and necessarily incurred by him in connection with the defense of such action, suit or proceeding ... assessed against the corporation ... upon court order ... except in relation to matters as to which it shall be adjudged in such action, suit or proceeding that such officer, director or employee is liable for negligence or misconduct in the performance of his duties."

Section 68 discussed the applicability of section 64:

> "Sections sixty-four, sixty-five, sixty-six and sixty-seven of this chapter shall apply to an application made to a court in this state in any of the following cases:
>
> (a) when the corporation against whom the application is made for assessment of expenses pursuant to section sixty-four or for payment of expenses under the provisions of a certificate of incorporation, or other certificate filed pursuant to law, by-law or resolution, is a domestic corporation or a corporation doing business in this state;
>
> (b) when such expenses were incurred in an action or proceeding maintained in a court in this state;
>
> (c) when the application is made by a resident of this state and the director, officer or employee

> was a resident of this state at the time of the accrual of the alleged cause of action asserted in the litigation in which such expenses were incurred."

Thus, the statute, by its express terms, is to be applied when the right of reimbursement established by section 64 is asserted in a New York court under any one of the conditions of sections 68(a), (b) or (c). In the case at bar, both (b) and (c) are satisfied: the earlier action, Alleghany Corp. v. Kirby, was "in a court in this state"; Phillips is and was a resident of New York. The statute works as a direct instruction to a New York court to apply the New York indemnification provisions when, as under the circumstances of this case, a plaintiff makes application for his "reasonable expenses" as described in section 64.

Furthermore, the right established by the statute would seem to be the exclusive means to recovery of such expenses, notwithstanding Phillips's attempts to assert a right of reimbursement under a variety of other legal theories including agency, quasi-contract, implied contract, and quantum meruit. The exclusivity of the statutory remedy, apparent on the face of the statute itself, was confirmed in Bailey v. Bush Terminal Co., 46 N.Y.S.2d 877 (Sup. Ct. N.Y. Co. 1943), aff'd, 267 App. Div. 899, 48 N.Y.S.2d 324 (1st Dep't), aff'd, 293 N.Y. 735, 56 N.E. 2d 739 (1944), in which the court discussed the right of directors to recover "reasonable expenses" incurred in the defense of an action in which they were charged with "misfeasance in office" but which ended before the predecessor of sections 64 through 68 took effect. In Bailey, the court held that

> "no common law right to recover reimbursement exists, and ... in the absence of contract or statute, a director who successfully defends an action brought against him by his corporation or on its behalf cannot require the corporation to reimburse him for the cost of his expense ...."

Id. at 880;[4/] accord, Schwarz v. General Aniline & Film Corp., 305 N.Y. 395, 404-05, 113 N.E.2d 533, 537 (1953) (Carswell, J., concurring). The sole law to be applied to this action by a court in New York is the indemnification portion of the General Corporation Law. Plaintiff's attempts to avoid the indemnification statute by resurrecting his claim under other common law theories must fail.

Similarly, plaintiff may not argue that a Minnesota court would uphold his claim under a theory other than indemnification of a corporate officer or director, whether indemnification is claimed under a statute or the common law. In In re E.C. Warner Co., 232 Minn. 207, 45 N.W.2d 388 (1950), the Supreme Court of Minnesota stated:

> "Confusion has resulted from a failure to recognize that the position of a director of a corporation, though fiduciary in many respects, is *sui generis* and is not to be confused with the position of that of a trustee, quasi-trustee, or agent." Id. at 212, 45 N.W.2d at 392.

The court went on to conclude that directors were entitled to common law reimbursement, but solely because of their status as directors. Thus, Minnesota law would look exclusively to the law governing indemnification of corporate directors and officers under these circumstances, and within this specific area a court in New York must apply New York law.[5]

Referring to New York law, this Court must conclude that plaintiff's claims fail for two reasons. First, they are barred by the statute of limitations. Second, Phillips's own services as attorney pro se do not qualify as "reasonable expenses, including attorneys' fees" for which the statute permits reimbursement.

The applicable statute of limitations is that which existed under the New York Civil Practice Act ("CPA"),[6] which was in force until September 1, 1963. Since the plaintiff's right of reimbursement exists solely by virtue of the indemnification statute, see Schwarz v. General Aniline & Film Corp., 305 N.Y. at 404-05, 113 N.E.2d at 537 (Carswell, J., concurring), the proper statute of limitations is section 48(2) of the CPA, which provided as follows:

> "The following actions must be commenced within six years after the cause of action accrued:
>
> . . .
>
> "2. An action to recover upon a liability created by statute, except a penalty or forfeiture."[7]

The cause of action in this case accrued on June 5, 1963, the date on which final judgment was entered as to Phillips in Alleghany Corp. v. Kirby. Thus, the action was time-barred on June 5, 1969, almost three years before this lawsuit was begun. Phillips's contentions that the cause of action accrued at some later date--*i.e.*, at the conclusion of the appeals of other parties or when Phillips's demand for payment from IDS was refused--are without merit. Phillips had a right of recovery at the conclusion of Alleghany Corp. v. Kirby, which right he could have asserted in that action or in a separate proceeding. New York General Corporation Law § 65(b).[8/]

Plaintiff's claim also fails because it does not come within the scope of the statute. Section 64 of the New York General Corporation Law provided that "a director, officer or employee of a corporation" was entitled to reimbursement for "his reasonable expenses, including attorneys' fees, actually and necessarily incurred by him" in the defense of the actions covered by the statute (emphasis added). In discussing the purpose of this provision, the New York Court of Appeals made it quite clear that the statute was intended to alleviate the burden placed on corporate directors and officers by large attorneys' bills. The court stated that section 64 was passed to change the common law rule by which

> "the corporation in whose behalf a stockholder's suit is brought, was not obligated ... to pay legal fees incurred by directors in defending themselves as individual defendants in such an action. That left corporate directors (and

> officers) in an unsatisfactory position since, when sued and although successful in a stockholder's suit, they would find themselves exonerated from fault but subject to the heavy attorneys' fees characteristic of the defense of such actions...."

Schwarz v. General Aniline & Film Corp., supra, 305 N.Y. at 400, 113 N.E.2d at 535.

Phillips was not subject to any such "heavy attorneys' fees." He received no bill for an attorney's services.

The clarity of the statutory purpose behind the indemnification provisions also disposes of Phillips's equal protection argument. In distinguishing between those who pay attorneys to represent them and those who represent themselves, a distinction which does not involve a "suspect classification" or a "fundamental right,"[9] the New York legislature acted to relieve financial burdens experienced by the former but not experienced by the latter. This rational legislative response to a serious problem satisfies the constitutional standard.

Finally, Phillips's argument that

> "[t]he acts of defendant IDS in proposing that this Court deprive plaintiff of compensation for his services constitute an attempt to have this Court deprive plaintiff of the value of 120 days of service and 960 hours of time in violation of the Due Process of Law clause of the Fifth Amendment to the Constitution of the United States," Amended Complaint ¶ 48,

are likewise without merit. If this line of reasoning were followed to its logical conclusion, then every losing party in a legal action could claim that the court, in finding for the other side, was depriving the loser of due process of law.

For the reasons stated above, all of plaintiff's motions are denied, and summary judgment is granted in favor of defendant.

So ordered.

Dated: New York, New York
December 15, 1976

CHARLES H. TENNEY
U.S.D.J.

RANDOLPH PHILLIPS,
Plaintiff,
-against-
INVESTORS DIVERSIFIED SERVICES, INC.,
Defendant.

72 Civ. 1544 (CHT)

FOOTNOTES

1/ Plaintiff denominates most of his papers in part as "In Support of Plaintiff's Cross-Motion for Summary Judgment." No such motion is currently before the Court, the last having been denied as moot on December 19, 1974.

2/ Parts of this case were before Judges Frankel, Gurfein, Lasker, and Brieant of this court in mid-1972. A default judgment against Alleghany, then a defendant in this action, was obtained at the same time that an extension of Alleghany's time to answer or move with respect to the complaint was being granted. See Phillips v. Investors Diversified Services, Inc., 72 Civ. 1544 (CHT) at 2 (S.D.N.Y. Aug. 28, 1974).

3/ For example, in 1972 Judge Frankel of this court wrote of Phillips:

> "And the main causes of the unpleasantnesses have been the tenacious bellicosity and abusiveness of the plaintiff. Referring repeatedly to his medical problems--describing himself, with unquestioned accuracy, as 'an ill man of 61 1/2 years of age'--plaintiff has not stinted in heaping insult upon opposing counsel; he has filed voluminous and gratuitous attacks upon various state and federal judges; he has festooned his papers with baseless and essentially irrelevant charges of fraud, including 'fraud upon this court,' 'malice,' 'hidden motives,' and, to end with one of his gentler notes, the 'obvious ignorance' of counsel for defendant. He has urged, preposterously, that counsel for defendant be 'fined' and 'censured.'" Phillips v. Alleghany Corp., 72 Civ. 1544, at 3-4 (S.D.N.Y. June 15, 1972).

4/ Although Bailey directly concerned a demand for reimbursement from a corporation for the defense of a shareholder's derivative suit brought in the name of that corporation,

FOOTNOTES

its holding is applicable to the slightly different facts of the instant action. Here, plaintiff seeks reimbursement from IDS for his defense of an action brought in the name of Alleghany. The complex financial relationship between IDS and Alleghany, which was the actual subject matter of the Zenn v. Anzalone cases and which need not be discussed here, see Alleghany Corp. v. Kirby, supra, 218 F. Supp. at 170-81, creates sufficient identity between the two corporations for Bailey to be applied.

5/ Plaintiff also bases his right to recovery upon statements made to the court in Alleghany Corp. v. Kirby by Donovan Leisure as attorneys for his co-defendants. He claims that since Donovan Leisure has also represented IDS these statements should estop IDS from opposing this action. See Plaintiff's Memorandum, dated January 17, 1975, at 2-3. This argument is wholly without merit. The earlier statements, made by counsel to Phillips's individual co-defendants, are in no way relevant to this action against IDS.

6/ The principles of Erie Railroad Co. v. Tompkins, supra, also mandate a federal court sitting in diversity to apply the statute of limitations of the state in which the district court sits in most circumstances. Guaranty Trust Co. v. York, 326 U.S. 99 (1945).

7/ This statute of limitations has been shortened to three years. See New York CPLR § 214(2). When a limitation period has been changed, however, the plaintiff gets the benefit of the longer of the two possible periods, with both periods measured from the date of accrual of the cause of action. Id. § 218.

8/ Phillips argues that this action is governed by the 20 year statute of limitations concerning money judgments. CPLR § 211. He contends that when Judge Dawson awarded judgment to the defendant "together with the costs and disbursements of the action," Alleghany Corp. v. Kirby, supra, 218 F. Supp. at 187, that judgment included attorneys' fees. This argument ignores the language of the indemnification provisions, which require specific findings to be made by the court before attorneys' fees can be awarded. New York General Corporation Law § 67. Until such findings are made, no "money judgment" for attorneys' fees has been awarded, for "money judgment" is defined in the CPLR as "a judgment, or any part thereof, for a sum of money or directing the payment of a

FOOTNOTES

sum of money." New York CPLR § 105(n) (emphasis added). To date, no sum of money has been awarded to Phillips as attorneys' fees by any court.

Indeed, it seems that Phillips did assert a right of reimbursement in New York Supreme Court and that this application was denied, the court stating that it lacked jurisdiction, presumably since Phillips could not "show reasonable cause for a failure to make application" in the original proceeding. Phillips v. Alleghany Corp., Index No. 15360/64 (Sup. Ct. N.Y. Co., Jan. 8, 1965) (Greenberg, J.); see New York General Corporation Law § 65.

9/ The United States Constitution contains no explicit right to counsel in civil proceedings, and any such implied right would have to be grounded in the due process clause. However, the Supreme Court's recent treatment of due process in another civil context--bankruptcy proceedings--indicates that a right to counsel in civil proceedings would not be recognized as a fundamental right by the Court. See United States v. Kras, 409 U.S. 434, 441-50 (1973).

33

Tenney, J.

ENTERED IN DOCKET

U. S. DISTRICT COURT
FILED
DEC 20 1976
S. D. OF N. Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RANDOLPH PHILLIPS, Plaintiff

-against-

INVESTORS DIVERSIFIED SERVICES, INC., Defendant

72 Civil 1544 (CHT)

JUDGMENT

Plaintiff having moved pursuant to Rule 11, and defendant having moved for summary judgment, pursuant to Rule 56, of the Federal Rules of Civil Procedure, and the said motions having come on to be heard before the Honorable Charles H. Tenney, United States District Judge, and the Court thereafter on December 17, 1976, having handed down its memorandum decision denying all of plaintiff's motions, and granting summary judgment in favor of defendant, it is,

ORDERED, ADJUDGED and DECREED: That defendant INVESTORS DIVERSIFIED SERVICES, INC., have judgment against plaintiff RANDOLPH PHILLIPS dismissing the action.

Dated: New York, N.Y.
December 20, 1976

CLERK'S OFFICE
United States District Court
FOR THE
SOUTHERN DISTRICT OF NEW YORK

Phillips
vs.
Investors Diversified

Civil Action No. 72 1544 CHT

There was entered on the docket 12/20/76, 19
~~an order~~ (judgment)

, CLERK

lerk

A.O. NO. 163

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RANDOLPH PHILLIPS,

Plaintiff,

-against-

INVESTORS DIVERSIFIED SERVICES, INC. and ALLEGHANY CORPORATION,

Defendants.

---

72 Civil 1544 (CHT)

NOTICE OF APPEAL

PLEASE TAKE NOTICE that Randolph Phillips, plaintiff herein, hereby appeals to the United States Court of Appeals for the Second Circuit from the Judgment entered in this action on December 20,1976 and the orders of this Court entered herein on June 15,1972 vacating plaintiff's default judgment against Alleghany Corporation and of July 3,1972 denying reargument, and the order of September 25,1972 dismissing the complaint against Alleghany Corporation, and the order entered August 30,1974 denying plaintiff's motion under Rule 60(b)(4), and all orders entered herein since entry of plaintiff's default judgment against Alleghany Corporation on May 12,1972. and the Memorandum and order dated December 15,1976.

To: Richard L. Bond, Esq.
Marshall Bratter Greene, etc.
430 Park Avenue
New York, N.Y. 10022

RANDOLPH PHILLIPS
Plaintiff Pro Se
30 East 72nd Street
New York, N.Y. 10021